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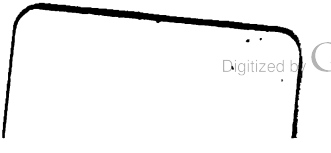

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MASSACHUSETTS REPORTS

123

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JUNE, 1877 — JANUARY, 1878

JOHN LATHROP

REPORTER

BOSTON AND NEW YORK
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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. HORACE GRAY, CHIEF JUSTICE.
HON. JAMES D. COLT.
HON. SETH AMES.
HON. MARCUS MORTON.
HON. WILLIAM C. ENDICOTT.
HON. OTIS P. LORD.
HON. AUGUSTUS L. SOULE.

ATTORNEY GENERAL.

HON. CHARLES R. TRAIN.

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FOR the sake of securing greater promptness of publication, the Reporter has printed the cases in the order of decision, without reference to terms of court; and has indicated, in a line at the head of each case, the county in which it arose, the dates of the argument and judgment, and the judges present. When only one date is so given, the case was argued and determined on the same day.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

WILLIAM D. PICKMAN *vs.* TRINITY CHURCH.
SAME *vs.* SAME.

Suffolk. Nov. 24, 1876. — June 26, 1877. GRAY, C. J., did not sit. AMES, J., absent.

A. agreed in writing to buy and B. to sell a lot of land on a street, lying between land previously sold by B. and land of C., at a certain price per square foot. B. caused the land to be surveyed, and A., supposing the survey to be correct, paid the price agreed for the number of square feet ascertained by it. The deed to A. stated as the consideration a sum which was equal to the number of feet, multiplied by the price stated in the agreement; and purported to give with accuracy the length of all the lines with the number of square feet in the lot, and bounded it on one side by C.'s land. Whether the number of square feet conveyed was equal to or less than stated in the deed, depended upon the question whether B. or C. owned a strip of land lying between lots admitted to be owned by them respectively, and which was conveyed in the deed from B. to A. *Held*, that if C. in fact owned the strip, an action for money had and received, to recover back part of the price paid, could be maintained, and that a bill in equity could not.

THE FIRST CASE was an action of contract for money had and received to recover $1311.57, alleged to have been paid by the plaintiff to the defendant by mistake. Answer, a general denial.

At the trial in the Superior Court, before *Wilkinson*, J., without a jury, the plaintiff offered to prove the following facts:

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In February, 1874, the defendant made a written agreement with the plaintiff to sell and convey to him, at the rate of $27 a square foot, a piece of land on Summer Street in Boston, bounded and described as follows: "All that lot of land bounded southerly on Summer Street, lying between the land sold by said corporation to Browning and Pickett and the land now or late of Thorndike, and extending northerly from said Summer Street to land of trustees under the will of Joshua Sears." The defendant caused the land to be surveyed, and informed the plaintiff that it contained seven thousand one hundred and twenty-six square feet, and that the price at $27 a square foot, under the agreement, was $192,402. The defendant also caused a deed to be executed conveying the land to the plaintiff, in which the consideration was stated to be $192,402, and the land was bounded and described as follows: "All that parcel of land in said Boston, bounded southwesterly on Summer Street, 55.81 feet; northwesterly in part on land now or late of Thorndike and partly on land of trustees under the will of Joshua Sears, 145.73 feet; northeasterly on land of the said trustees under the will of Joshua Sears, 41.34 feet; and southeasterly on land of said corporation, by a line parallel to the northwesterly line of Hawley Street, as recently established, and thirty feet distant therefrom, 148.90 feet. Containing seven thousand one hundred twenty-six square feet." The covenants in the deed were limited to the lawful claims and demands of persons claiming by, through or under the grantor. The line of the land upon Summer Street was, in fact, eight inches shorter than that given by the deed, and the contents of the land were in consequence 48.57⅓ square feet less than those given by the deed. The line in which the plaintiff contended that this error occurred is measured from the land of Thorndike, on the northwest, to the line thirty feet distant from the side of Hawley Street, and parallel therewith on the southeast; and the plaintiff fixed the boundary of the land of Thorndike by the southeasterly face of a wall. The plaintiff paid the defendant $192,402, and the deed was delivered to him in March, 1874. About two months afterwards the plaintiff prepared to build on his land, and then first discovered the deficiency in measurement and quantity.

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The defendant contended that the land of Thorndike was eight inches northwesterly from the place fixed by the plaintiff, that is, on the northwesterly face of the wall; that the length of the line upon Summer Street and the contents of the land were correctly given by the deed; and that the whole of the land covered by said wall had been the property of the defendant, and passed to the plaintiff by the deed; and asked the judge to rule that the action could not be maintained, because it was an action to try the title of real estate. The judge so ruled, and ordered judgment for the defendant.

No question was raised as to the correctness of the measurements of the line on Summer Street, between the points taken by the defendant as its bounds, or as to the computation of the area from those elements. The question was whether the land of Thorndike extended to the northwesterly or southeasterly side of the wall.

The plaintiff alleged exceptions to the foregoing ruling.

THE SECOND CASE was a suit in equity, in which the bill alleged the same facts, and prayed that the defendant might be compelled to pay to the plaintiff the sum of $1311.57, and interest, and for further relief. The answer contained a demurrer, that the plaintiff was not entitled to relief, for the following reasons: 1. That there was no error or mistake in measurement or calculation alleged, but only a partial failure of title, against which the plaintiff was not protected by the agreement or deed. 2. That the matters alleged in the bill might be tried and determined at law. 3. That the court had not jurisdiction of a bill praying for the payment of a sum of money, except as ancillary to a prayer for specific performance, or some other relief.

Hearing before *Devens*, J., who reserved the case on the bill and demurrer for the consideration of the full court.

F. E. Parker & J. L. Thorndike, for the plaintiff.

J. C. Ropes & W. P. Blake, for the defendant. 1. The only foundation of the plaintiff's claim is that a strip of land, covered by a wall and forming a portion of the land which the defendant conveyed or undertook to convey to the plaintiff, was the property of Thorndike, and not of the defendant, and did not pass to the plaintiff by the defendant's deed. If the strip belonged to the defendant, as the defendant contends, then it

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must have passed by the deed, and the plaintiff has no case. The sole question is whether the land now belongs to the plaintiff or to Thorndike. The decision of the case, therefore, involves a question of the title to real estate; and it is a settled principle of law that such a question cannot be tried in an action for money had and received. *Lindon* v. *Hooper*, Cowp. 414. *Brigham* v. *Winchester*, 6 Met. 460. *Codman* v. *Jenkins*, 14 Mass. 93. 2 Chit. Con. (11th Am. ed.) 907. See also *Newsome* v. *Graham*, 10 B. & C. 234; *Miller* v. *Miller*, 7 Pick. 133; *Bigelow* v. *Jones*, 10 Pick. 161; *Tamm* v. *Kellogg*, 49 Misso. 118; *Carpenter* v. *Stilwell*, 3 Abbott Pr. 459.

2. The case of *Williams* v. *Hathaway*, 19 Pick. 387, is decisive of the case at bar, on a different ground. It was there held, that when a deed is executed in pursuance of a contract for the sale of land, all prior proposals and stipulations are merged in the deed; and therefore that an action cannot be maintained for the recovery of the agreed price per foot, when it turns out that the number of feet conveyed is less than the number which the defendant had agreed to convey. In this view of the case, the plaintiff's sole ground for relief, supposing his claim to be true, would be on the covenants for title contained in the defendant's deed, if any. But this action is not brought on such covenants. *Smith* v. *Evans*, 6 Binn. 102. *Dorsey* v. *Jackman*, 1 S. & R. 42. *Earle* v. *De Witt*, 6 Allen, 520.

Colt, J. The plaintiff in each of these cases seeks to recover money paid to the defendant corporation as part of the consideration for a deed of land which proved deficient in the quantity agreed to be conveyed. The first case is an action at law for money had and received. It was tried by the court without a jury. The plaintiff offered to prove, in substance, that he agreed in writing to buy and the defendant agreed to sell an estate on Summer Street, lying between land which it had previously sold to other parties and land of Thorndike, at twenty-seven dollars by the square foot; that the defendant caused the land to be surveyed, and the plaintiff, believing the survey to be correct, paid the price agreed for the number of square feet ascertained by it; that the deed to him purported to give with accuracy the length of all the lines with the contents of the lot, and bounded it on the northwest by Thorndike's land; that the

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line on Summer Street was in fact shorter, and therefore the contents of the estate less than stated in the deed, and that the last named line should have been measured from the southeast face of a wall, which was the true boundary of Thorndike's land, instead of the northwest face as claimed by the defendant.

The evidence thus offered shows that the quantity of land was made an essential element of the bargain, and was relied on to fix the price to be paid. There is nothing in the terms of the deed, such as the use of the words "more or less," or equivalent words, which has any tendency to show that the parties, at the time of the delivery of the deed, changed the terms of the original bargain, or agreed to take the land conveyed at the estimated instead of the actual quantity; on the contrary, the deed is entirely consistent with and carries out the original bargain.

It presents the case of a payment by the plaintiff under a mistake of a material fact; that is to say, of a fact without the existence of which there was no obligation upon the plaintiff to pay the full sum which was paid. For such a payment, an action for money had and received will lie.

It was ruled, at the request of the defendant, that the action could not be maintained, because it was an action to try the title to real estate. The law is indeed well settled that such title cannot be tried in an action for money had and received. But in this case the facts do not warrant the application of that rule. The question here is not one of title between these parties to the land conveyed, but of the subject matter described in the agreement and in the deed which followed it. The proposition of the plaintiff is that the land for which he paid is not included in the conveyance. An action on the covenants of title and warranty, if there are any, can afford him no redress; for the covenants in a deed extend only to the land conveyed. *Spurr* v. *Benedict*, 99 Mass. 463.

The defendant chose to bound the estate conveyed by it on the line of Thorndike's land. By the terms of the deed, his line was made a monument which controls the distances given and the quantity of land stated. In *Howe* v. *Bass*, 2 Mass. 380, where land was conveyed bounding on a street for a distance named and on each side by lands of other persons, it was held that all the land between the lots named passed, although the

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distance was sixty-five feet on the street where the deed called for only forty-five, and this because the lands referred to as monuments must govern the distances named. And when land is described in a deed as running a certain distance by measurement to land of the heirs of a person deceased, though without a visible boundary marking the line, such line is of itself a monument which will control the admeasurement, and fix the extent of the land conveyed. *Flagg* v. *Thurston*, 13 Pick. 145. See also *Curtis* v. *Francis*, 9 Cush. 427, 438; *Gerrish* v. *Towne*, 3 Gray, 82, 87.

The question in this case then is where the line called for by the deed is. But the evidence which fixes that location does not establish or defeat the title of Thorndike, who is not a party to the suit, although an inquiry into his title is involved. It does not establish or defeat any title of the defendant; it only ascertains the limits of land conveyed by it to the plaintiff by a valid and unquestioned deed. The title of Thorndike is incidentally involved, but is not, accurately speaking, put in issue. The rule referred to does not prevent an action for money had and received in many cases which require an investigation of title. Thus the deposit made on an agreement to purchase real estate may be recovered back on proof that the title is bad. Sugden on Vendors, (14th ed.) 358. And the vendor cannot sue the vendee on the contract of purchase, unless he has shown or offered to show a good title, if bound so to do. 1 Chit. Con. (11th Am ed.) 424. *Eames* v. *Savage*, 14 Mass. 425. The right to recover in these cases depends on the title, and yet they are not cases in which the title is tried, within the meaning of the rule. The reasons upon which the rule is founded apply only when the parties to the suit claim the land by adverse titles. Thus in *Codman* v. *Jenkins*, 14 Mass. 93, it was held that a common count for rent would not lie in favor of a stranger who claimed title, or by one of two litigating parties; and in *Bigelow* v. *Jones*, 10 Pick. 161, that a party who was disseised could not maintain assumpsit to recover of a disseisor money received for trees sold by him; while in *Miller* v. *Miller*, 7 Pick. 133, a tenant in common was permitted to recover for trees sold by his co-tenant, on the ground that there was no controversy about the title of the parties. *Brigham* v. *Winchester*, 6 Met. 460.

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Upon the evidence offered in this case, there was as much a mistake of fact as if the chain used to measure the lines had been found imperfect, or there had been a miscount when the money was paid over. This action is to recover the money only. To establish his right, the plaintiff needs no form of equitable relief; his remedy is perfect at law. The claim for damages is not to be confounded with that compensation which is awarded as incidental to other relief, in cases where a specific performance is decreed upon the application of either party to a contract for the sale of land, with an allowance to be made for deficiency in quantity.

The case of *Tarbell* v. *Bowman*, 103 Mass. 341, is not distinguishable in principle from the case at bar. There the length of one of the lines was incorrectly given in the deed, and the area of the land was incorrectly computed. The defendant was decreed in equity, (no question of jurisdiction having been raised,) to repay to the purchaser the amount paid by mistake.

But the defendant relies on the case of *Williams* v. *Hathaway*, 19 Pick. 387, which was assumpsit to recover back money paid by the plaintiff on the purchase of land, on account of deficiency in quantity. That case was decided upon rules of evidence not applicable here. The court declared that it appeared by the deed itself that the plaintiff paid a certain sum of money for the whole of the land described and identified, and that it must be understood from the deed, either that it was in fact measured, or that the parties were content to estimate it at the quantity named in the deed. It was accordingly held that all prior stipulations were merged in the deed, which must be held to express the final and entire contract between the parties. It is elsewhere said, by good authority, that whenever it appears by definite boundaries, or by words of qualification as "more or less," or "by estimation," or the like, that the statement of the quantity of acres in the deed is mere matter of description and not of the essence of the contract, the buyer takes the risk, if there be no element of fraud. 4 Kent Com. 467. *Stebbins* v. *Eddy*, 4 Mason, 414. In *Williams* v. *Hathaway* it appears that the land was estimated at fifteen acres, and was struck off to the plaintiff on that estimate for a price named by the acre. It does not appear that it was not surrounded by permanent and

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well marked natural or artificial boundaries, and all that the case decides is that where the deed declares, in express or equivalent words, that the quantity of land is estimated, it cannot be shown to contradict it that exact quantity was an essential element of the bargain. In other words, it may be shown by the terms of the conveyance that the precise quantity previously contracted for was waived. It is familiar law that the consideration named in the deed may be shown by parol evidence not to be correctly stated. In the case at bar, there is certainly nothing in the deed to vary the terms of the previous contract as to the price to be paid, and the consideration stated therein is not decisive.

The plaintiff's remedy at law is adequate and complete, and the entry in the first case must be *Exceptions sustained.*

The other case is a bill in equity to recover the same money. No ground is stated for any relief peculiar to courts of equity. For the reasons above stated, the judgment is

Bill dismissed.

MARY D. K. BUCKLEY & another *vs.* JAMES W. GERARD & others.

Suffolk. April 2.—June 26, 1877. COLT & SOULE, JJ., absent.

Oral evidence that a testatrix, who devised all her estate to her husband, was a woman of great intelligence and capacity, that she was very fond of her children, who were of tender age and never separated from her, that she had great affection for and the most perfect confidence in her husband, and that he was very devoted to her, is admissible, and will justify a finding that her omission to provide in her will for her children was intentional and not occasioned by accident or mistake, although no declaration of the intention of the testatrix appears.

PETITION by Mary D. K. Buckley and Julian G. Buckley, minor children of Juliette A. Buckley, appearing by their next friend, for partition of a parcel of land in Boston, of an undivided third part of which their mother Juliette A. Buckley died seised. Katharine L. Buckley, the step-mother of the petitioners, was the only respondent who appeared.

At the trial in this court, before *Endicott*, J., without a jury it appeared that Mary D. K. Buckley was born on July 2, 1860

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that Juliette by her will, dated January 4, 1864, devised and bequeathed all her property to her husband, Thomas C. T. Buckley, and made no mention of her child; that in April, 1866, Juliette inherited the land in question from her mother; that on July 3, 1866, Julian G. Buckley was born; and that his mother died on July 27, 1866, without altering her will or otherwise providing for her children during her life; that subsequently Thomas C. T. Buckley married the respondent Katharine L., and by a codicil to his will gave to her the income of all the property acquired by him under the will of his first wife, until his children should severally come of age or until the death of his wife, whichever should first happen.

The respondent, against the objection of the petitioners, introduced the following evidence:

James W. Gerard testified that he was a lawyer of over twenty-five years' standing at the New York bar, and was the brother of Juliette A. Buckley; that Thomas C. T. Buckley was a lawyer of good standing in his profession; that at the time Mrs. Buckley's will was made, she and her husband and their child, the petitioner Mary, lived together, and that he did not think they were ever separated; that she was an affectionate mother, and appeared very fond of her child, and never lived apart from her; that there appeared to be affection and confidence between her and her husband; and that Thomas C. T. Buckley was acute and shrewd and able, and very familiar with all business relating to property and rights of property.

James Thomson, the next friend of the petitioners, testified that he was a lawyer of twenty-eight years' standing at the New York bar; that he had known Thomas C. T. Buckley since early life, and became acquainted with Mrs. Buckley after their marriage; that Mr. Buckley was a lawyer, and his standing was very high and prominent; that they had one child in January, 1864; that he did not think they were ever separated from each other or from the child; that they never lived apart, and if at all separated it would be by some temporary journey; that Mrs. Buckley was of high character as to intelligence and mental capacity; that she was devoted to her child and very fond of her, and they never lived apart; that she seemed to be devoted to her husband and to trust to his honor and ability, that they

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appeared to entertain for each other mutual affection and confidence; that as a business man and manager of property Mr. Buckley's character was of the very highest; that he was able, shrewd, prudent and economical.

Dr. Fordyce Barker testified that he was a physician in New York, and had practised his profession thirty-five years; that he became acquainted with both Mr. and Mrs. Buckley soon after their marriage, and his acquaintance continued during their lives; that he saw them frequently and intimately, and was their family physician during their respective lives; that Mrs. Buckley's daughter lived with her in January, 1864, and they never were separated; that she was remarkably affectionate and devoted to her daughter; that Mr. and Mrs. Buckley were remarkable for their entire affection and devotion to each other; that he believed, from his observation as her family physician, that there existed the most perfect confidence and affection between them; that he should say she was a devoted wife and trusted in his honor and ability, and that Mr. Buckley was a man to inspire and deserve such confidence, devotion and trust; that he always regarded Mrs. Buckley as a person of very superior intelligence; and that he knew nothing of her as to her knowledge of business matters, but she was a very keen observer.

Upon the foregoing facts and evidence the petitioners contended that they were entitled to one undivided third of the land in question under the Gen. Sts. *c.* 92, § 25; and the respondent contended that it sufficiently appeared that the omission by the mother to provide for the children was intentional and not occasioned by accident or mistake.

The judge found as a fact that the omission by Juliette A. Buckley to provide for her children in her will was intentional, and not occasioned by accident or mistake, and reserved the case for the determination of the full court upon certain questions, of which the following only need now be stated: Whether said evidence, admitted against objection, was admissible; and whether the facts and admissible evidence herein reported were sufficient in law to warrant such finding of fact as to the intention of Mrs. Buckley. Such disposition of the case was to be made by the full court as law and justice might require.

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T. P. Proctor, for the petitioners. The Gen. Sts. *c.* 92, § 25, provide that "when a testator omits to provide in his will for any of his children, or for the issue of a deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate; unless they shall have been provided for by the testator in his lifetime, or unless it appears that such omission was intentional, and not occasioned by accident or mistake." Under this statute the burden of proof is on a person, claiming under a will, to show that the omission was intentional. *Ramsdill* v. *Wentworth*, 106 Mass. 320. In this case it appeared that one of the children was born a long time after the will was made and but a few days before the mother's death; and the land in question was only inherited by the testatrix a short time before her death. The evidence of the respondent shows no act or statement of the testatrix bearing upon the question of intention. It merely shows that she and her husband lived harmoniously and that both were intelligent. If true, it was as consistent with non-intention as intention, but did not tend to prove either, and was inadmissible. *Bancroft* v. *Ives*, 3 Gray, 367, 371. In the only cases in this Commonwealth, in which extrinsic evidence has been held to be competent to show an intention to omit a child, the positive declarations of the testators appeared. *Wilson* v. *Fosket*, 6 Met. 400. *Converse* v. *Wales*, 4 Allen, 512.

W. G. Russell & G. Putnam, Jr., for Katharine L. Buckley, were not called upon.

MORTON, J. The justice, before whom this case was heard, without a jury, has found as a fact that the omission by Juliette A. Buckley to provide for her children in her will was intentional and not occasioned by accident or mistake. This is decisive against the petitioners, if such finding was justified by the evidence.

The parol testimony admitted, tending to show the intelligence of the testatrix and her relations to her husband and her children, at the date of the will and to the time of her death, was clearly competent. *Converse* v. *Wales*, 4 Allen, 512. *Ramsdill* v. *Wentworth*, 101 Mass. 125.

The will of Mrs. Buckley makes no mention of her children and gives her whole estate to her husband. But it cannot fairly

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be interred from this that she omitted to provide for her children unintentionally and by accident or mistake.

It appeared in evidence that she was a woman of great intelligence and capacity, that she was very fond of her children, who were never separated from her, that she had great affection for and the most perfect confidence in her husband, and that he was very devoted to her. Considering the affection and respect she felt for her husband, and the tender age of her children, it was not unnatural or unreasonable that she should leave her estate to him, trusting to his known affection to support and educate their children and to make suitable provision for them by his will.

To assume that she unintentionally omitted to provide for the child living when the will was made, is to assume that she forgot that she had a child, which is incredible. Taking all the evidence in this case, without referring to it more minutely, it seems to us clear that it justified the presiding justice in finding that the omission to provide for the petitioners, in the will of their mother, was intentional and not by accident or mistake.

This view makes it unnecessary to consider the other questions presented in the report. *Judgment for the respondents.*

DURGY CEMENT AND UMBER COMPANY *vs.* JOHN B. O'BRIEN.

Suffolk. April 9. — June 26, 1877. COLT & SOULE, JJ., absent.

A. sold goods to B., to be paid for upon their delivery, either in cash or in the notes of B. The goods were shipped on a vessel under a bill of lading by which they were to be delivered to B. on his paying the freight. Before the vessel arrived, B.'s notes were protested because of his inability to pay them in the usual course of business, and an agent of A., having heard that B. had failed, sent a person to stop the goods *in transitu*. This person, whose acts were subsequently ratified by A., before B. had paid or tendered the freight or come into possession of the goods, but, after they had been attached by a creditor of B., demanded the goods of the master of the vessel, and forbade his delivering them to B. *Held*, that A. had seasonably exercised the right of stopping the goods *in transitu*.

REPLEVIN of 771 barrels of cement attached by the defendant, as a deputy of the sheriff of Suffolk, on a writ against

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a firm doing business in Boston under the name of Downing & Co. At the trial in the Superior Court, before *Wilkinson*, J., it appeared that the plaintiff had sold the cement to Downing & Co., and claimed the right to stop it *in transitu*, on account of the insolvency of Downing & Co. The judge reported the case for the consideration of this court. If, upon the evidence reported, there was any question for the jury, the case was to stand for trial; otherwise, judgment was to be entered for the plaintiff or the defendant, as the court might order. The case appears in the opinion.

W. C. Williamson, for the plaintiff.

G. W. Morse, for the defendant.

MORTON, J. The report in this case is in some respects irregular. It sets out the evidence given at the trial, which upon some points is conflicting. If these points were material, we could not consider them, but the only proper course would be to discharge the report and have the conflicting evidence submitted to a jury. But, upon a careful examination of the report, we are satisfied that sufficient undisputed facts are disclosed to enable us to determine the rights of the parties.

By a familiar rule of law, a vendor of goods has the right, in case of the insolvency of the buyer, to stop the goods *in transitu*, while they remain in the hands of a carrier. He may exercise this right at any time before the goods come into the possession of the buyer. *Mohr* v. *Boston & Albany Railroad*, 106 Mass. 67, and cases cited.

By the term "insolvency" of the buyer is meant his inability to pay his debts in the usual course of business. It is not necessary that he should have been adjudicated a bankrupt or insolvent debtor.

In the case at bar, the plaintiff sold the replevied goods to Downing & Co. to be paid for upon their delivery in Boston, either in cash or in the notes of the buyers. They were shipped at New Haven for Boston under a bill of lading by which they were to be delivered to Downing & Co., they paying freight therefor. Before the vessel arrived at Boston, the notes of Downing & Co. "went to protest, and they have not paid them since," and the officers of the plaintiff corporation, having learned "that Downing & Co. had failed in business," sent an

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agent to Boston for the purpose of stopping the goods *in transitu.*

We understand the statement in the report, that the notes of Downing & Co. "went to protest, and they have not paid them since," to mean that their notes were protested because of their inability to pay them in the usual course of business. This was such insolvency of the buyer, within the rule above stated, as authorized the vendor to exercise his right of stoppage *in transitu.*

It appears that the vessel arrived in the harbor of Boston on November 13, and, on the same day, was visited by the agent of the plaintiff. It is not necessary to consider whether what the agent did on that day amounted to a stoppage *in transitu.* The testimony upon this point is conflicting. But this is not material, because it is clear that on November 15, he, on behalf of the plaintiff, demanded the goods, and forbade their delivery to Downing & Co. Up to this time, and indeed up to the time the goods were replevied, they had not come to the possession of the buyers. Downing & Co. had not paid or tendered the freight, the goods had not been removed from the vessel, but were in the hands of the captain as a carrier. Thus all the facts appear which are necessary to give the vendor the right to assert its lien on the goods by stopping them *in transitu,* and the acts of the agent, and the bringing of the replevin suit by him, were an exercise of that right.

The fact that the goods were attached by a creditor of the buyer, on November 13, is immaterial. Such attachment, before the transit is at an end, will not defeat the right of the vendor. *Naylor* v. *Dennie,* 8 Pick. 198. *Seymour* v. *Newton,* 105 Mass. 272.

The defendant contends that the agent of the plaintiff, who stopped the goods *in transitu* and caused the replevin suit to be brought, was not duly authorized. It is not necessary to discuss this question, because the subsequent ratification of his acts by a vote of the directors cured any defect in his original authority, if there was any. It is to be observed that such ratification was before the buyer or his assignee had obtained possession of or made any demand for the goods, and thus the question decided in *Bird* v. *Brown,* 4 Exch. 786, is not raised in this case.

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For these reasons we are of opinion that, upon the facts appearing in the report which are undisputed, the plaintiff has shown a right to maintain this action.

Judgment for the plaintiff.

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY *vs.* SIDNEY BARTLETT & others, trustees.

Suffolk. May 4. — June 26, 1877. LORD & SOULE, JJ., absent.

Under the St. of Missouri of December 10, 1855, § 18, providing that "after the Hannibal and St. Joseph Railroad shall be completed, equipped and in operation, said road shall be required to pay into the treasury of the state the surplus proceeds of all land sales, or such other securities as may be provided by the company, in a deed of trust or otherwise, in a place to be adopted by said company, to raise funds to complete the road," only so much of such proceeds is to be paid to the state as remains after deducting the amount of all expenses and obligations lawfully incurred by the corporation in completing, equipping and putting in operation its railroad, including sums advanced by the corporation to trustees for expenses of the management, surveying and disposing of lands granted by Congress and included in deeds of trust, and for taxes thereon, and to satisfy reclamations on bad titles and other incidental expenses; sums paid, either in money or in stock, to discharge the bonds issued by the corporation, and secured by deeds of trust, and the interest on such bonds; and sums paid and obligations incurred to other parties than the state to raise money to complete the road and not secured by mortgage thereof.

GRAY, C. J. The Hannibal and St. Joseph Railroad Company was incorporated by an act of the Legislature of Missouri of February 16, 1847, with authority to construct, maintain and operate a railroad about two hundred miles long from Hannibal to St. Joseph, both in that state.

By an act of February 22, 1851, the Legislature of Missouri, for the purpose of expediting the construction of this railroad, authorized a loan of the credit of the state to the amount of a million and a half of dollars, by issuing to the corporation, from time to time, in amounts of fifty thousand dollars, bonds bearing interest at the rate of six per cent., upon satisfactory evidence that the corporation had expended in the actual construction of its road a like amount collected on its capital stock, and made the obligation of the corporation to pay those bonds and interest

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a first mortgage upon the road and its appurtenances and upon the net income thereof.

By an act of Congress of June 10, 1852, the United States granted to the State of Missouri alternate sections of the public lands on each side of the road, to be exclusively applied to the construction thereof, and to be disposed of only as the work progressed, and, if the road should not be completed within ten years, the lands unsold to revert to the United States. And the State of Missouri, by a statute of September 20, 1852, and subject to the provisions of the act of Congress, granted these lands to this corporation, and authorized it, for the purpose of raising funds, from time to time, for the construction and completion of the road, and the purchase of iron and other materials to be used thereon, to issue bonds, payable at such place as it might designate and secured by mortgage of these lands.

By a statute of Missouri of February 23, 1853, it was enacted that "the said company shall have power, from time to time, to borrow such sums of money as may be necessary, subject to the prior lien of the state, for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage, if necessary, their corporate property and franchises, or any part thereof, to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer, on any holder of any bonds issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of said company, at any time, not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt."

On December 10, 1855, the Legislature of Missouri passed an act, entitled "an act to secure the completion of certain railroads in this state," reciting the passage of the act of 1851 and other acts lending the credit of the state to this and other railroad corporations; "and whereas the amount so loaned, together with all the private stock that can be raised from subscriptions, is insufficient to complete the aforesaid roads; and whereas, for the amount of state credit so loaned to each road respectively, the state holds a statutory mortgage upon each road, which is a prior lien thereon; and whereas it is deemed important to the

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interest of the state that the aforesaid roads should be completed in the shortest practicable time; and whereas it appears that the state's prior lien is an impediment to the credit of the several companies in raising further large sums, which are necessary to complete their roads, while the present loan, with all the private stock as aforesaid bound under the state's prior lien, will not amount to one half of the amount necessary to complete said roads; therefore" enacting that whenever the Hannibal and St. Joseph Railroad Company should have drawn and expended the whole amount of the former loan, a further loan of the credit of the state, to the amount of a million and a half of dollars, should be made to this corporation in bonds of the state at a rate of interest not higher than seven per cent., upon like proof of investment as in the act of 1851, "except as to the amount shown to have been invested in the construction of the road from private stock, or sources other than the proceeds of state bonds, and not secured by a prior lien to that of the state on the road and its appurtenances," and upon the condition of a first lien or mortgage as contained and reserved in that act; requiring certain payments to be made annually by the corporation to create a sinking fund, as additional security for the payment of the interest and principal of such bonds; providing that, upon a failure of the corporation to pay interest, no further bonds of the state should be issued to it; and containing the following section:

"Section 18. After the Hannibal and St. Joseph Railroad shall be completed, equipped and in operation, said road shall be required to pay into the treasury of the state the surplus proceeds of all land sales, or such other securities as may be provided by the company, in a deed of trust or otherwise, in a place to be adopted by said company, to raise funds to complete the road, to be applied by the treasurer to the retiring of the bonds of the state, issued and loaned to said company under this or former acts."

The plaintiff, in 1856, in order to raise funds to aid in the construction of its railroad, made an issue of its so called land grant bonds, to the amount of five million dollars, bearing semiannual interest and payable in 1881; and, in order to secure the principal and interest of these bonds to the holders thereof, executed and delivered to Sidney Bartlett and others, as trustees for such

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bondholders, a deed of trust and mortgage, conveying all its estate, right and interest in the lands granted by Congress in aid of the construction of its road; and in 1858 made an additional issue of its bonds, to the amount of a million and a half dollars, payable in 1883, and secured by a like deed of trust and mortgage, to H. Hollis Hunnewell and others as trustees. All these bonds were duly sold and negotiated by the corporation, and the proceeds thereof applied towards the cost of constructing and completing its railroad.

Within ten years of the passage of the act of Congress of 1852, that is to say, by September, 1859, the corporation duly constructed and completed its railroad, and has ever since maintained and operated the same for public travel and transportation.

By an agreement between the corporation and the bondholders in 1863, preferred stock in the corporation was issued for thirty per cent. of the principal of the bonds of the first issue and forty per cent. of the bonds of the second issue. Large portions of the lands embraced in the deeds of trust have been sold and conveyed by the trustees, and the proceeds thereof applied by them according to the provisions of the deeds. Either by the issue of preferred stock as aforesaid, or by such payments, the whole amount of such bonds has now been paid, taken up and satisfied.

This bill is brought against the trustees under the deeds of 1856 and 1858, to terminate the trust, and to compel them to account, and to pay and transfer to the plaintiff all the money, lands and securities remaining in their hands. The State of Missouri has been admitted as a party defendant to the bill, and it is agreed that the state may have the same relief in this suit as if a cross bill had been filed.

The decision of the case depends upon the true construction of the eighteenth section of the statute of 1855, in the light of the facts already stated, and is more important for the amount involved than for any intrinsic difficulty in the question to be decided.

The fund, out of which the payment to the State of Missouri is to be made, as defined in that section, is the "proceeds of all land sales, or such other securities as may be provided by the

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company, in a deed of trust or otherwise, in a place to be adopted by said company, to raise funds to complete the road." The fund must therefore be derived from the proceeds of sales of lands, or from the proceeds of such other securities as may be provided by the company by deed of trust or other like instrument.

But the corporation is not required to pay to the state the whole of such fund or proceeds. It is to pay only the "surplus" thereof, "after the Hannibal and St. Joseph Railroad shall be completed, equipped and in operation." The necessary implication appears to us to be that only so much of such proceeds is to be paid to the state, as remains after deducting the amount of all expenses and obligations lawfully incurred by the corporation in completing, equipping and putting in operation its railroad, and that the amount so to be deducted must include the following items: 1st. Sums advanced by the corporation to the trustees, for expenses of the management, surveying and disposing of the lands granted under the act of Congress and included in the deeds of trust, and for taxes thereon, and to satisfy reclamations on bad titles, and other incidental expenses. 2d. Sums paid, either in money or in stock, to discharge the bonds issued by the corporation and secured by the deeds of trust, including the interest on such bonds, the accruing of which gave time for a rise of value in the lands, and which, as much as the principal, was a part of the cost of constructing the road. 3d. Sums paid and obligations incurred to other parties than the state, to raise money to complete the road, which, though not secured by mortgage thereof, were equally a part of the cost of its construction. This result, which appears to us to be required by the terms of this section, carries out the main purpose of all the legislation upon the subject.

The court understands it to be admitted that the deduction of these sums, from the proceeds of the sales of lands and of the securities in the hands of the trustees, will leave no surplus to which the State of Missouri can in any form be entitled. But as the reasonableness, as well as the amount, of the expenses and obligations incurred by the plaintiff may be a subject of controversy, the proper order will be that, for the purpose of stating the account between the parties, the

Case be referred to a master.

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E. R. Hoar & J. A. Hockaday (of Missouri), for the plaintiff.

S. Bartlett, for the trustees.

B. F. Thomas, for the State of Missouri.

WILLIAM MAHONEY *vs.* JOHN LIBBEY & others.

Suffolk. Nov. 15, 16, 1876. — June 28, 1877. AMES, LORD & SOULE, JJ., absent.

In an action for personal injuries caused by the falling of the defendant's wall, there was evidence that the defendant's building and a building upon the adjoining estate, the side walls of which were very near but distinct from each other, were destroyed by fire; that the two side walls remained standing to a level with the street, with rubbish piled against and to the top of each; that about six months afterwards, as the plaintiff with others had nearly removed the wall upon the adjoining estate, the defendant's wall fell, causing the injuries. There was no evidence that the defendant's wall was dangerous or could have fallen while both buildings stood, or while both walls remained in the condition in which they were left by the fire, or that the defendant had notice, or was bound to know, that the wall on the adjoining estate had been or was about to be removed. *Held*, that the action could not be maintained.

TORT for personal injuries sustained by the plaintiff by the falling of a wall upon him.

At the trial in this court, before *Lord*, J., the plaintiff offered evidence tending to show that the estate upon which the wall fell, and the estate upon which it had stood, were situate on Federal Street, adjoining each other; that the buildings on them had been burned in the great fire of November 9, 1872, which swept over both sides of Federal Street; that the fire left the walls between these estates, running from front to rear, about on a level with the street, being a few feet higher at the front and rear ends than in the middle, and being from eight to fourteen feet in height from the cellar floor of the estate on which the wall fell; that the cellars on both estates were filled with rubbish, coming up against the walls to the tops thereof; that in May, 1873, the estate adjoining the defendant's estate was purchased by James Tucker & Co., and one McCarthy agreed to take down the remaining walls on the estate, clean the bricks,

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and remove the useless rubbish within a given time, and the plaintiff testified that he and three others agreed with McCarthy to clean all the bricks, and, in doing so, occupied different places on the cellar floor, which was of plank, near the bricks to be cleaned.

McCarthy testified that when he commenced work, under his contract, on the Tucker wall, both the cellars were full of rubbish up to the tops of both walls; that he supposed there was but one wall between the estates, as the upper courses of brick were loose and covered with rubbish, and there were large quantities of brick and rubbish on both estates; that upon removing all the loose brick, which consisted of one or two courses, he found two entirely separate and distinct walls, one or more inches apart, the wall standing on the defendant's estate being eight inches, and that on the Tucker estate twelve inches thick; that he then proceeded to take down the Tucker wall carefully by courses, in such a way as to prevent injury to the brick, which were to be used again, and that in doing this he applied no force whatever to the defendants' wall; that he was at work in taking down this wall parts of several days; that he worked on this wall the day preceding the accident; and that before or about noon of that day he had taken down all of it except a few courses in the rear, and that this was all the work done on the wall before the accident; that before the accident all the rubbish had been removed from the Tucker side of the defendants' wall, and no brick of any consequence remained on that side, and the Tucker wall had been taken down as low as the cellar floor; that on the morning of the accident he was standing near the defendants' wall, within twenty minutes of its fall, when he was called off, and went into the street, where he saw the wall as it fell; that it went over suddenly, like a board fence, burying and causing the death of two of the men, and partially burying the plaintiff; that he shouted to the men when he first saw the wall start, but they had not time to get clear; that while at work on the Tucker wall, and down to the time of the fall of the defendants' wall, he saw no indications that the latter wall was not safe, and saw no cracks in it; that it appeared straight, and although he knew that the rubbish in the cellar on the defendants' estate came up to a level with this wall, he supposed it had settled before that time to its bearings.

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The plaintiff testified, that he and the other men with him, engaged in cleaning the brick, commenced work about seven o'clock on the morning of the accident, and that they were seated on the cellar floor of the Tucker estate, within a few feet of the wall on the defendants' estate, at work cleaning the brick which had been taken from the Tucker wall; that he saw nothing in the defendants' wall to indicate that it was not safe, and that he had no suspicions that it was not so; that he knew that there was rubbish back of this wall, reaching to the top; that he heard the shout and started, but that the wall caught him before he could get clear.

The plaintiff's evidence tended to show that nothing had been done to either estate, but that they had remained as they were left by the fire, until and except what was done on the Tucker estate under the McCarthy contract.

This was all the evidence offered by the plaintiff, except such as related to the nature and extent of his injuries. The judge was of opinion that this evidence was not sufficient to entitle the plaintiff to maintain his action, and directed a verdict for the defendants, and reported the case for the determination of the full court upon the question whether the plaintiff could maintain his action. If the plaintiff could maintain his action upon the foregoing evidence, the verdict was to be set aside and a new trial ordered; otherwise, judgment on the verdict.

D. Thaxter & F. Bartlett, for the plaintiff.

C. A. Welch, for the defendants.

GRAY, C. J. The plaintiff relies on the duty of every owner of land to keep the buildings or structures thereon in such a condition that they shall not, by falling or otherwise, cause injury to property or persons lawfully upon adjoining land.

But assuming that this duty is absolute while the structures are in the condition in which the owner has put them, or knows or is bound to know them to be, yet, when he has been guilty of no negligence, and the condition of the structures has been changed, so as to render them injurious or dangerous, by *vis major*, or the act of a third person, which the owner had no reason to anticipate, he cannot be held liable for the injury, or bound to make the structures safe, until he has had a reasonable time, after they have so become dangerous, to take the necessary

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precaution. *Nichols* v. *Marsland*, L. R. 10 Ex. 255, and 2 Ex. D. 1. *Gray* v. *Harris*, 107 Mass. 492.

In the case at bar, there was no evidence that the defendants' wall was dangerous or could have fallen while both buildings stood, or while both walls remained in the condition in which they were left by the fire, or that the defendants had notice, or were bound to know, that the wall on the adjoining estate had been or was about to be removed; and the full court concurs with the justice who presided at the trial in the opinion that the evidence introduced was insufficient to support the action.

Judgment on the verdict for the defendants.

JOHN P. TREADWELL *vs.* CITY OF BOSTON.
SAME *vs.* SAME.

Suffolk. March 6. — June 28, 1877. ENDICOTT & SOULE, JJ., absent.

A. owned an estate on the corner of K. Street and W. Street, upon which were five stores fronting on W. Street, one extending the whole depth of the estate and four to a private way called B. Place, running back from K. Street, which was parcel of the estate, subject to no easement and kept open for his tenants, and east of which was a building fronting on K. Street, in the rear of which was a dwelling house abutting on and entered from B. Place. K. Street was widened and two assessments of betterments were laid on the estates on the "corner of K. Street and W. Street," and on the "corner of B. Place," respectively. At the trial of two petitions brought by A. for a jury to revise these assessments, the presiding judge instructed the jury that the assessment in one case applied to all of A.'s land east of B. Place and in the other to all the remainder of the estate. *Held*, that A. had no ground of exception.

On a petition for the revision of a betterment assessed on land for the widening of a street, evidence of the injury to business by the obstruction of the street during the process of widening is inadmissible.

The benefit to land caused by the widening of a street is to be assessed according to its value at the date of the widening.

On a petition for the revision of a betterment assessed on land at the corner of W. Street and K. Street for the widening of K. Street, evidence that land on K. Street may be best used for lots fronting on W. Street instead of K. Street, is admissible.

TWO PETITIONS to the Superior Court, under the St. of 1871, c. 382, § 7, for a jury to revise assessments of betterments, made by the board of street commissioners of the city of Boston, the

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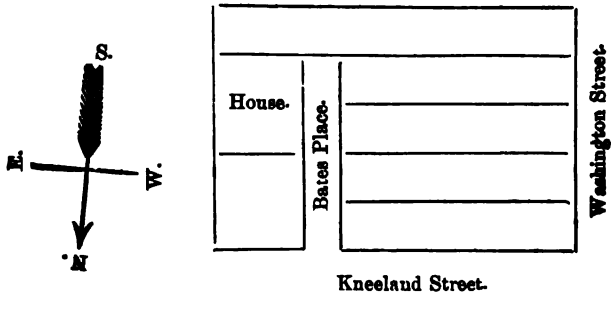
first upon that part of the petitioner's estate situated at the corner of Kneeland Street and Washington Street, and the second upon that part situated at the corner of Bates Place, on account of the widening of Kneeland Street. The two cases were tried together, by consent of parties, before *Brigham*, C. J., who allowed a bill of exceptions, the substance of which appears in the opinion. The plan of the land introduced at the trial is printed in the margin.*

G. O. Shattuck, (*O. W. Holmes, Jr.* with him,) for the petitioner.

J. P. Healy & H. W. Putnam, for the respondent.

COLT, J. The petitioner is the owner of an estate situate on the southeast corner of Washington Street and Kneeland Street. There are five stores on the same, fronting on Washington Street. The first four extend back from that street to a private way, called Bates Place, running back from Kneeland Street, which is parcel of the petitioner's estate, is subject to no easement, and is only kept open by him for the use of his tenants. The fifth store extends the whole depth of the petitioner's land. On the east side of Bates Place is a building fronting on Kneeland Street, and in the rear of it a dwelling-house abutting on and entered from Bates Place.

The petitioner, in two separate petitions, which were tried together by consent, asks for a reduction of two assessments laid for the expense of widening Kneeland Street, one on that part of the estate fronting on Washington Street, and the other on that part which is east of Bates Place. The estates assessed were described respectively as the estate on the corner of Knee-



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land Street and Washington Street and the estate on the corner of Bates Place.

1. We cannot say, in view of the situation and use of the petitioner's estate, as shown by the plan, that the judge erred in instructing the jury that the assessment in one case applied to all the petitioner's land east of Bates Place, and in the other, to all the remaining land included in the deed to him. It was the manifest intention to include the whole of the land in both assessments, and the descriptions of the two adjoining lots must be construed together so as to give effect to both.

2. The rejection of the evidence offered to prove injury to business by the obstruction of the street during the process of widening is not open to exception. The question for the jury was of the permanent benefit and advantage, if any, which these estates had received by this public improvement beyond the general advantage derived. Upon that question the temporary inconvenience occasioned by its construction was a matter so insignificant and remote that it might properly be excluded as an element in the estimate. See *Brooks* v. *Boston*, 19 Pick. 174, 178.

3. The benefit is to be estimated as of the date of the widening; subsequent changes, such as unusual depression in business, or loss of trade from any cause, cannot be taken into account to affect the jury's estimate of the benefit to the market value of the property which accrued at the time of the widening. *Jones* v. *Boston*, 104 Mass. 461, 466. See also Gen. Sts. c. 43, § 14; *Parks* v. *Boston*, 15 Pick. 198, 208; *Dickenson* v *Fitchburg*, 13 Gray, 546, 558.

4. Some question was made by the petitioner at the trial, as to the legality of the assessment, but that question was not pressed at the argument. See *Crandell* v. *Taunton*, 110 Mass. 421.

All the points made by the petitioner at the argument, which are applicable to both petitions, are thus disposed of. But there was evidence that the value of the land east of Bates Place was due to the fact that it could in the future be best improved by using it to enlarge in the rear the lots fronting on Washington Street. We can see that the amount of the benefit to be assessed on the land east of Bates Place, for the widening of Kneeland Street, may well be affected by the consideration that the

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land may be best used for lots fronting on Washington Street instead of Kneeland Street, and that in the future it will be likely to be so used. These were considerations which concerned the capabilities and actual value of that part of the estate, and tended to diminish the benefit likely to accrue from the widening of a street which, in the best use of the land, would bear the relation of a side street to it.

The judge excluded this part of the evidence. But the ruling was prejudicial to the plaintiff only in respect to the assessment on the land east of Bates Place; as to the land fronting on Washington Street, the only tendency of the evidence was to increase both its value and the amount of benefits to be assessed. In the case which relates to the land last named the exceptions must be overruled. If there is any good reason, arising out of the fact that the cases were tried together, why a new trial should be granted, the application for it must be made in the Superior Court. In the other case the entry must be

Exceptions sustained.

HANNAH JAGER *vs.* OBADIAH ADAMS.

Suffolk. March 8. — June 28, 1877. ENDICOTT & SOULE, JJ., absent.

A person, who is constructing a brick wall abutting upon a highway, may be liable for negligence in not providing safeguards or barriers to prevent the accident of a brick falling, to the injury of a passing traveller, although there is no negligence of his servants, who are breaking and handling the bricks.

TORT for personal injuries. Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, so much of which as is material to the understanding of the point decided is stated in the opinion.

G. O. Shattuck & J. L. Eldridge, for the plaintiff.

A. A. Ranney, for the defendant.

COLT, J. The plaintiff was struck by a falling brick, or part of a brick, while passing along the sidewalk in front of a building in process of erection, upon the front wall of which, in an upper story, the defendant, who was doing the mason work of the building under a contract, had men at work laying brick from the inside. The plaintiff contended that the defendant

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was liable for not preventing the approach of foot passengers by suitable barriers across the walk, and also for allowing his men to work in that place without protection in front, to prevent the falling of brick or other material upon the thoroughfare below.

There was evidence, consisting in part of the defendant's admissions, from which the jury might have found that the brick was dropped by one of the defendant's men, or fell off the wall at the point where they were at work. And it was possible for them to find that the immediate falling was not shown to have been due to any act which, considering the nature of the employment, could be called the negligent act of the men at work, or of any one of them. To meet this aspect of the case, the plaintiff asked the court to rule that, even if the brick fell by accident, the defendant might be liable for neglect in putting men to handle brick where a passing traveller would be liable to injury from it. The court refused this, and, while instructing the jury that the plaintiff must satisfy them that her injury was the result of the fault or negligence of the defendant or of some person in his employ, also told them that, if the falling of the brick was the result of an accident, and not of any negligence of the defendant's servants, he was not liable; and that the mere fact that a piece of brick fell from the building that the defendant was erecting would not justify the jury in presuming that he was guilty of a lack of reasonable care.

But it is a matter of common knowledge and experience, that, when men are breaking and handling bricks in the construction of such a wall, some of the material may fall, although the workmen, in fitting and laying it, are in the exercise of ordinary care. The immediate cause of the fall in such case may indeed be accidental, but it is an accident which the builder of the wall, in view of the danger to life and limb, may be bound to contemplate and provide against by safeguards or barriers, so that the traveller may not be exposed to injury; not to do so would be an "omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do." Alderson, B., in *Blyth* v. *Birmingham Waterworks*, 11 Exch. 781, 784.

The jury found that the plaintiff had failed to prove that the brick which struck the plaintiff fell through the negligence or

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carelessness of the defendant or his agents, or employees, and returned a verdict for the defendant.

In view of the plaintiff's request, which sufficiently, though imperfectly, called the attention of the court to the distinctions above stated, and the instruction which was actually given as to the accidental falling of the brick, with the form of the finding by the jury, we think the jury may have misunderstood or been misled by the rulings of the court, and the entry must be

Exceptions sustained.

BOSTON ICE COMPANY *vs.* EDWARD POTTER.

Suffolk. April 4. — June 28, 1877.

A., who had bought ice of B., ceased to take it on account of dissatisfaction with B., and contracted for ice with C. Subsequently B. bought C.'s business and delivered ice to A., without notifying him of his purchase until after the delivery and consumption of the ice. *Held*, that B. could not maintain an action for the price of the ice against A.

CONTRACT on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial.

At the trial in the Superior Court, before *Wilkinson*, J., without a jury, the plaintiff offered evidence tending to show the delivery of the ice and its acceptance and use by the defendant from April 1, 1874, to April 1, 1875, and that the price claimed in the declaration was the market price. It appeared that the ice was delivered and used at the defendant's residence in Boston, and the amount left daily was regulated by the orders received there from the defendant's servants; that the defendant, in 1873, was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Company sold its business to the plaintiff, with the privilege of supplying ice to its customers. There was some evidence tending to show that the plaintiff gave notice of this change of business to the

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defendant and informed him of its intended supply of ice to him; but this was contradicted on the part of the defendant.

The judge found that the defendant received no notice from the plaintiff until after all the ice had been delivered by it, and that there was no contract of sale between the parties to this action except what was to be implied from the delivery of the ice by the plaintiff to the defendant and its use by him; and ruled that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and that the plaintiff could not maintain this action. The plaintiff alleged exceptions.

J. P. Farley, Jr., for the plaintiff.

E. C. Bumpus & E. M. Johnson, for the defendant.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills* v. *Snell*, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

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A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Orcutt* v. *Nelson*, 1 Gray, 536, 542. *Winchester* v. *Howard*, 97 Mass. 303. *Hardman* v. *Booth*, 1 H. & C. 803. *Humble* v. *Hunter*, 12 Q. B. 310. *Robson* v. *Drummond*, 2 B. & Ad. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. *Mudge* v. *Oliver*, 1 Allen, 74. *Orcutt* v. *Nelson*, *ubi supra*. *Mitchell* v. *Lapage*, Holt N. P. 253.

There are two English cases very similar to the case at bar. In *Schmaling* v. *Thomlinson*, 6 Taunt. 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of *Boulton* v. *Jones*, 2 H. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the

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defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence. *Exceptions overruled.*

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JOHN W. THORNTON *vs.* MARGINAL FREIGHT RAILWAY COMPANY & another.

Suffolk. March 23. — June 29, 1877. LORD & SOULE, JJ., absent.

A charter of a corporation, granted subsequently to § 41 of the Gen. Sts. *c.* 68, may, under the power reserved in that section, be repealed by the Legislature.

Under the Gen. Sts. *c.* 68, §§ 36, 37, continuing every corporation whose charter has been annulled, for the term of three years afterwards, for the purpose of prosecuting and defending suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock, and giving this court power to appoint a receiver, at any time within said three years, to do all acts which might have been done by the corporation if in being, necessary for the final settlement of its unfinished business, a judgment recovered against a corporation after the expiration of three years from the repeal of its charter, no receiver having been appointed, is void.

This court has no jurisdiction in equity of a bill by a creditor against a corporation to apply, to the payment of a judgment, property of the debtor in the hands of a third party, if the judgment was invalid at the time it was recovered, and the corporation had ceased to exist.

By the St. of 1872, *c.* 342, the charter of the Marginal Freight Railway Company was repealed, and the Union Freight Railroad Company was incorporated, with power to take the tracks of the former company, making compensation therefor in a manner provided. The St. of 1876, *c.* 229, authorized certain railroad corporations to hold stock in the Union Freight Railroad Company, and provided that nothing in the act contained should be construed as affecting the legal rights of the Marginal Freight Railway Company. *Held*, that this act could not be construed as a legislative recognition that the last named company had, at the time of the passage of the act, an existence or any legal rights.

BILL IN EQUITY, filed February 2, 1877, against the Marginal Freight Railway Company and the Union Freight Railroad Company, alleging that the plaintiff, at July term 1875 of the Superior Court for the county of Suffolk, recovered judgment against the Marginal Freight Railway Company, for money due from it to him before May 6, 1872, upon which judgment execution was duly issued, and remained unsatisfied; that the charter of the Marginal Freight Railway Company was repealed or attempted to be repealed, by the St. of 1872, *c.* 342, passed May 6, 1872, at which time it owned certain railroad tracks in the streets of Boston; that the Union Freight Railroad Company was incorporated by the same statute, and by virtue thereof took these tracks; that the Marginal Freight Railway Company, being dissatisfied with the estimate duly made of its damages by

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reason of such taking, filed a petition to the Superior Court for a jury to estimate such damages, which application was still pending; that the interest of the Marginal Freight Railway Company in its claim for damages could not be come at to be attached or taken on execution in an action at law against it; and that the Marginal Freight Railway Company neglected to press its application for a jury.

The prayer of the bill was that the Marginal Freight Railway Company might be ordered to prosecute, or to permit the plaintiff to prosecute, that petition to final judgment; that the Union Freight Railroad Company might be ordered to pay to the plaintiff so much of such judgment as might be recovered against it as might be necessary to satisfy the plaintiff's debt; that the defendants might be restrained from discontinuing or settling the action without first paying to the plaintiff the amount of his debt; and for further relief.

The Union Freight Railroad Company demurred, on the ground that the plaintiff's judgment against the Marginal Freight Railway Company was void, and that the bill could not be maintained against either defendant, because the charter of that corporation was repealed more than three years before the recovery of the judgment or the bringing of the bill; and for want of equity.

The Marginal Freight Railway Company filed an answer, containing a demurrer for want of equity.

Hearing before *Endicott*, J., who reserved the case, on the bill and demurrers, for the consideration of the full court.

A. B. Wentworth, for the Marginal Freight Railway Company.

W. G. Russell, for the Union Freight Railroad Company.

P. E. Tucker, for the plaintiff.

GRAY, C. J. The bill is framed upon the theory that the plaintiff has recovered a valid judgment against the Marginal Freight Railway Company; that that company has a claim for damages for the taking of its tracks by the Union Freight Railroad Company; and that the interest of the former company in this claim cannot be come at to be attached or taken on execution in a suit at law against it, and should therefore be applied in equity to the payment of the plaintiff's judgment debt. The

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difficulties in the way of maintaining this bill appear to us to be insuperable.

The St. of 1867, *c.* 170, by which the Marginal Freight Railway Company was incorporated, was subject to repeal at the pleasure of the Legislature, by virtue of the power expressly reserved by the Gen. Sts. *c.* 68, § 41, which was a part of the contract made between the Commonwealth and the corporation by its charter. That charter was expressly and legally repealed by the St. of 1872, *c.* 342, which incorporated the Union Freight Railroad Company, and authorized the latter corporation to take the tracks of the former, making compensation therefor in the manner provided by the laws relating to the taking of lands by railroad companies. *Crease* v. *Babcock*, 23 Pick. 334. *Pennsylvania College Cases*, 13 Wall. 190. *State* v. *Miller*, 1 Vroom, 368, and 2 Vroom, 521. *Metropolitan Railroad* v. *Highland Railway*, 118 Mass. 290.

Upon the absolute repeal of a charter by the Legislature, acting within the limits of its constitutional authority, the corporation ceases to exist, and no judgment can afterwards be rendered against it in an action at law. But such repeal does not impair the obligation of contracts made by the corporation with other parties during its existence, or prevent its creditors or stockholders from asserting their rights against its property in a court of chancery, in accordance with the reasonable regulations of the Legislature, or with the general principles and practice in equity *Foster* v. *Essex Bank*, 16 Mass. 245. *Read* v. *Frankfort Bank*, 23 Maine, 318. *Merrill* v. *Suffolk Bank*, 31 Maine, 57. *Mumma* v. *Potomac Co.* 8 Pet. 281. *Curran* v. *Arkansas*, 15 How. 304. *Bacon* v. *Robertson*, 18 How. 480. *Lum* v. *Robertson*, 6 Wall. 277.

Upon the repeal of the charter of the Marginal Freight Railway Company by the St. of 1872, *c.* 342, which was passed and took effect on May 6, 1872, the corporation was nevertheless, by virtue of the Gen. Sts. *c.* 68, § 36, continued a body corporate for the term of three years afterwards, for the purpose of prosecuting and defending suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock. And, under § 37 of the same chapter, this court, sitting in equity, on the applica-

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tion of a creditor or stockholder, at any time within the three years might have appointed receivers, whose powers should continue as long as the court should deem necessary, to take charge of the estate and effects of the corporation, to collect the debts and property due and belonging to it, to prosecute and defend suits, in its name or otherwise, and to do all other acts which might be done by the corporation, if in being, necessary for the final settlement of its unfinished business.

No application having been made for the appointment of a receiver, the Marginal Freight Railway Company, at the expiration of the three years, ceased to have any such existence that a valid judgment could be rendered against it in an action at law. We cannot regard the provision of the St. of 1876, *c.* 229, § 3, that "nothing in this act contained shall be construed as affecting the legal rights of" that corporation, (which is not otherwise mentioned in the act,) as a legislative recognition that it had, at the time of the passage of this statute, any rights or any existence. The judgment recovered by the plaintiff against the Marginal Freight Railway Company in July, 1875, was therefore wholly void, as if it had been rendered against a dead person.

This bill cannot be maintained under that clause of the Gen. Sts. *c.* 113, § 2, which confers upon this court jurisdiction of "bills by creditors to reach and apply, in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor;" because that clause extends only to living debtors and existing corporations. And a court of equity has no general jurisdiction of a bill by a single creditor, who has not recovered a valid judgment against his debtor, and whose debtor has ceased to exist, to apply, to the payment of his debt, property of the debtor in the hands of a third party.

Although one passage near the end of the opinion in *Folger* v. *Columbian Ins. Co.* 99 Mass. 267, taken by itself, might seem to be inconsistent with this view, it is to be observed that that case, as well as the earlier one of *Taylor* v. *Columbian Ins. Co.* 14 Allen, 353, was submitted to the court upon an agreed statement of facts, waiving all questions of form, and was decided

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upon the ground that the corporation did not appear to have been dissolved.

The reasons above stated being conclusive against the right to maintain this bill, the demurrer of the Union Freight Railroad Company must be sustained, and the *Bill dismissed.*

EZRA B. ELY & another *vs.* EDWARD B. JAMES & another.

Suffolk. April 4. — June 29, 1877. AMES & ENDICOTT, JJ., absent.

In an action for the price of a cargo of coal, to which the defence was payment by the note of a third person, there was evidence that an offer for the coal to be delivered in Maine, at a certain price per ton, was made by the defendant in Massachusetts to an agent of the plaintiff, who did business in New York; that this offer was sent by the agent to the plaintiff, and accepted by him; and the coal was sent to Maine by a vessel hired by the plaintiff for the purpose, with an invoice, which stated the price per ton, less freight; that, on delivery of the coal, the defendant paid the freight and sent a promissory note of a third person in settlement for the price as stated in the invoice, and requested the return of the invoice receipted; that the plaintiff wrote on the invoice, "Received payment by note," signed it and returned it to the defendant; that the plaintiff got the note discounted, and, on failure of the maker to pay it at maturity, took it up and tendered it to the defendant, and, on the maker being adjudged a bankrupt, proved it against his estate, after this action was brought. There was also evidence that, at the time of making the offer, the agent agreed that payment might be made by the note of the third person, and that the plaintiff had previously sold a cargo of coal to the defendant, and had received the note of the same third person in payment. *Held*, that the conduct of the plaintiff, after receiving the order, was evidence of a ratification of the agent's acts, from which, in connection with the former transaction, previous authority in the agent to take the note of the third person in payment might be inferred. *Held, also*, that whether the plaintiff knew or did not know of the agreement of the agent to take the note of the third person, at the time the note was accepted by the plaintiff, was immaterial, if the plaintiff accepted without objection what he had reasonable ground to believe was the result of the agency. *Held, also*, that the judge was not bound to instruct the jury that the fact that the defendant paid the freight would authorize a finding that the coal was delivered to a carrier in New York, and that the contract was a New York contract. *Held, also*, that the evidence of the proof of the note in bankruptcy against the estate of the maker was competent as tending to show that the plaintiff treated the note as his own, and originally accepted it as payment.

No exception lies to the refusal of a judge to give an instruction which assumes a fact to be proved which is in controversy.

By the law of this Commonwealth, the giving of the negotiable promissory note of a third person is evidence of payment of a preëxisting debt, and sufficient where there is nothing to defeat the inference or show that such was not the intention of

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the parties; and, in the absence of evidence to the contrary, the rule will be presumed to be the same in Maine.

The law of another state must be proved as facts are proved; but if the evidence admitted consists of a judicial opinion, its construction is for the court.

CONTRACT on an account annexed for the price of a cargo of coal. Writ dated November 18, 1874. Answer, payment by the note of George B. James & Co. At the trial in the Superior Court, before *Aldrich*, J., the following facts appeared in evidence:

The plaintiffs were shippers of coal in New York, and the defendants were dealers in coal in Portland, Maine, under the firm name of James & Williams. Edward B. James, one of the defendants, was in the employ of George B. James & Co., in Boston, and also purchased and ordered coal in Boston for his own firm in Portland. F. B. Crowell, travelling in the plaintiffs' employ, called on Edward B. James at the office of George B. James & Co., in Boston, and solicited an order on the plaintiffs for a cargo of coal for the defendants, offering to sell it at a certain price. James declined to give this price, but offered to take a cargo for his firm at another price, which was less than Crowell was authorized to sell for, and Crowell thereupon signed and sent to the plaintiffs a telegram, on June 20, 1874, in the following terms: "James & Williams offer six eighty for Lehigh broken delivered Portland." This was the offer James had made to him. The plaintiffs thereupon telegraphed to the defendants an acceptance of this offer, and shipped the coal by a schooner to the defendants at Portland, Maine, on June 27, 1874, and sent them an invoice of the coal, as follows:

"New York, June 27th, 1874. Messrs. James & Williams bought of E. B. Ely & Co. Lehigh Coal per Sch. Rebecca Florence.

397 tons broken @ $6.80 del'd at Portland, less freight @ 1.35, $5.45	$2,163.65
Add 4 mos. & 3 days int. 7% . . .	51.74
	$2,215.39"

After receiving the coal, the defendants signed and sent to the plaintiffs in New York the following letter, inclosing the invoice and a note of George B. James & Co.: "Boston, July 11, 1874.

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Messrs. E. B. Ely & Co., New York. Dear Sirs: Enclosed please find G. B. James & Co.'s note dated June 27th, four months, for $2,215.39, being in settlement of the enclosed invoice coal per Rebecca Florence, which please receipt and return to us here." The plaintiffs thereupon wrote the following receipt on the invoice, and sent it to the defendants: "Received payment by 4 mos. note of G. B. James & Co., Boston, for $2,215.39 due Oct. 30, '74. E. B. Ely & Co." The plaintiffs also wrote to the defendants as follows: "New York, July 13, 1874. Messrs. James & Williams: Yours of the 11th with G. B. James & Co. note at 4 mos. for cargo per Rebecca Florence received. We would much prefer shorter paper, as we cannot use it to same advantage."

The plaintiffs kept the note and got it discounted, but it was protested on October 30, 1874, for non-payment, resulting from the failure about that day of George B. James & Co., and the plaintiffs paid the amount due on the same to the holder. George B. James & Co. were adjudicated bankrupts in March, 1875, and no dividend to their creditors has been declared. On November 6, 1874, the plaintiffs offered the note back to the defendants, and notified them that the plaintiffs would hold them for the price of the coal, but the offer was not accepted, and the plaintiffs produced the note at the trial.

The defendant James testified that, after the occurrence between him and Crowell above related, and after Crowell had got out of the door of the office, he, James, called him back and asked him if this coal was to be paid for in George B. James & Co.'s paper, as usual, and that Crowell said "Yes," and another witness testified that he heard James ask this of Crowell, but could not remember his reply. The defendants further testified that they had purchased coal of the plaintiffs before, and sent George B. James & Co.'s notes to the plaintiffs for it, and that the notes were paid; but whether they had so purchased more than one cargo they could not remember. Crowell testified that nothing was said about George B. James & Co.'s paper between James and himself. One of the plaintiffs and Crowell testified that the plaintiffs had given him authority to travel and sell and solicit orders for coal at prices fixed in a circular, with liberty to vary these prices within a limit stated by the plaintiffs to him.

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and to fix the terms as to time of payment, and to sell for cash or its equivalent, and that the plaintiffs reserved the right to reject any order so obtained, if the credit of the person ordering was unsatisfactory to them, but that Crowell had no authority to agree that the notes of others than the purchasers should be taken for the coal, and Crowell testified that, in fact, he had never done so. The plaintiffs also testified that they had, before shipping the cargo in question, shipped only one cargo to the defendants, and it appeared that the order for this cargo was taken by Crowell, and was a written one, signed by the defendants, in terms as follows: "Portland, Me., July 14, 1873. E. B. Ely & Co. sold James & Williams 150 to 175 tons, Susq. stove f. o. b. 5.40. Insure. Freight limited to 1.90, if cannot ship for that, can cancel the order. Cash or 3 mos. note 7% int."

The defendants offered in evidence the proof by the plaintiffs of the note of George B. James & Co. against their estate in bankruptcy, in November, 1875, as tending to show that the plaintiffs treated the note as their own, and that they had orignally accepted it as payment, and the judge admitted the evidence, the plaintiffs excepting.

The plaintiffs contended that the contract respecting their receiving the note of George B. James & Co. was to be interpreted and governed by the law of New York, and that by that law the transaction did not amount to payment, and read the cases of *Vancleef* v. *Therasson*, 3 Pick. 12, and *Schemerhorn* v. *Loines*, 7 Johns. 311, on this point.

The plaintiff E. B. Ely testified that his firm had no intimation that Crowell had agreed that George B. James & Co.'s paper should be taken for the cargo in question. The coal was shipped from New York for Portland on a vessel procured for that purpose by the plaintiffs.

The defendants' counsel argued to the jury, among other things, that no evidence was before them to show what the law of New York was at the time of the transactions in question, the only authority read being a decision in 1810.

The plaintiffs, before the charge to the jury, requested the judge to rule as follows:

"1. That the whole contract was to be interpreted by the law of New York, and that the giving of George B. James & Co.'s note did not amount to payment.

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"2. That the contract was contained in the correspondence only, and any oral agreement made by Crowell was not to be taken as a part of it.

"3. That, there being no evidence as to there having been any previous agreement as to George B. James & Co.'s paper, the agreement of Crowell as to this cargo was not an agreement that it should be payment.

"4. That if there was no agreement in previous transactions that George B. James & Co.'s paper should be received in discharge of the defendants' liability for coal, then Crowell did not agree to take George B. James & Co.'s note in full discharge for this cargo.

"5. To direct a verdict for the plaintiffs."

The judge refused to give these requests, the second on the ground that the evidence as to what Crowell had orally agreed went to the jury without objection, and left it to the jury to say whether there had been any such previous agreement as that mentioned in the third request, and to find what Crowell agreed.

The judge also instructed the jury that if there was an express agreement, at the time the contract of sale was made, to take the note of George B. James & Co. in absolute payment for the coal, it was a binding contract, whether construed by the law of Massachusetts or that of New York; and further instructed the jury as follows:

"1. That it was for the jury to determine whether the plaintiffs gave Crowell authority beforehand to make such a contract. 2. That if they did, his contract bound the plaintiffs. 3. That it was for the jury to determine whether the plaintiffs ratified the contract of Crowell to take the note of George B. James & Co., if he made it. 4. That if the contract was to deliver the coal to the carrier in New York, and from that time to be at the risk of the defendants, the contract was to be interpreted by the law of New York; but that if the contract of the plaintiffs was to deliver the coal in Portland, it was not. But whether the sale of the coal was coupled by a delivery of it in New York or in Portland, would not necessarily be conclusive of the question as to the place where the payment was by the terms of the contract to be made, which was to be determined upon all the evidence in the case. 5. That under the law of Massachusetts

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the giving a note of a third person by the purchaser to the seller is *primâ facie* payment of a preëxisting debt. 6. That the unwritten or common law of New York may be proved by parol evidence or by the books of reports of cases adjudged in the courts of that state, and the plaintiffs' counsel has read in evidence a case from the 7th of Johnson, a New York Report, tending to show that by the law of that state the taking of a promissory note for goods sold is not an extinguishment of the original debt or *primâ facie* evidence of it; and, although this case was decided in 1810, it is the duty of the court to say to the jury that, in the absence of any conflicting evidence, that is to be taken to be the law of New York at the present time; but it is not for this court to tell the jury how much or how little that reported case proves, it being a question of fact for the jury upon the evidence to find what the law of New York on the subject in question was or is."

To each of these instructions numbered 1 to 5 the plaintiffs excepted; and after the charge to the jury the plaintiffs requested the judge further to rule:

"1. That there was no evidence that authorized a finding that the plaintiffs authorized Crowell beforehand to contract to take the notes of others than purchasers of coal from the plaintiffs.

"2. That if the plaintiffs did not authorize Crowell beforehand to contract for others' notes than the defendants', the contract for payment was a distinct contract from that of sale, and consisted merely of the sending the note to New York and the receipt signed by the plaintiffs in New York and forwarded by them, and was, as a matter of law, a New York contract.

"3. That there was no ratification of Crowell's contract to take George B. James & Co.'s note in payment, if he made it, if the plaintiffs were not informed of what he had contracted about it.

"4. That there was no ratification of Crowell's contract to take George B. James & Co.'s note in payment, if he made it.

"5. That, under the law of Massachusetts, giving a third person's note for a preëxisting debt is not *primâ facie* payment.

"6. That the receipt showed that the plaintiffs did not pay freight and that the defendants did, and this would authorize a

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finding that the coal was delivered to a carrier in New York by the plaintiffs, and that it was a New York contract.

"7. That the jury were to take the authorities read to them as proof of what the New York law is.

"8. That the New York law is that taking a note for a pre-existing debt and giving a receipt in full is not payment."

The judge refused so to rule; the jury returned a verdict for the defendants; and the plaintiffs alleged exceptions to the refusal to rule as requested.

T. L. Livermore, for the plaintiffs.

P. A. Collins, for the defendants.

COLT, J. An offer for a cargo of coal to be delivered at Portland, the defendants' place of business, at a price named, was given by the defendants in Boston to a travelling agent of the plaintiffs, and forwarded by the latter by telegraph to the plaintiffs' place of business in New York. The offer was accepted, and, on receipt of the coal at Portland, the defendants sent the note of G. B. James & Co. to the plaintiffs for the amount of the purchase, payable in four months to the plaintiffs' order, inclosed in a letter, which stated that it was in settlement for the coal, and requested the return of the invoice receipted. The invoice was at once returned by the plaintiffs, receipted as paid by the note in question. The latter thereupon indorsed the note, had it discounted, and, upon failure of the makers, took it up at maturity. Soon after the defendants were notified that the plaintiffs intended to hold them for the price of the coal, and an offer was made to return the note to the defendants.

The plaintiffs contend that the effect of taking the note of a third party was to be determined by the law of New York, and that, by the law of that state, the transaction between these parties did not amount to payment for the coal. In support of these propositions many instructions requested by the plaintiffs were refused, and some were given by the court which were perhaps not absolutely required by the state of the evidence.

The evidence shows that the contract was for delivery in Portland. That was the defendants' order by telegraph accepted by telegraph, without qualification or condition. The coal was shipped by the plaintiffs to that place on June 27, 1873, on a vessel procured for that purpose by them, and a

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bill of sale of that date, stating the number of tons at the price offered, and reciting that it was to be "delivered at Portland less freight," with interest added for four months and three days, was sent to the defendant. After the receipt of the coal, the defendants sent the note, which bore the date of the bill of sale, and was for the exact amount of the bill, with the interest added, and the plaintiffs returned the bill of sale with a receipt of payment by note written on it. There is nothing in the case to control or contradict this evidence of the contract of the parties as to the place of delivery. Until the coal was delivered in Portland, the contract of sale was executory and the property did not pass.

It is equally plain and uncontradicted that the note, dated at and payable in Boston, was sent from that city to the plaintiffs in New York in settlement for the coal, and received without objection by them. The sale of the coal and the delivery of the note appear to have been parts of one transaction, taking effect as of the same date. The note conformed in amount, date and time of maturity to the requirements of the plaintiffs' bill of sale. It was taken without the defendants' indorsement and was made payable to the plaintiffs' order. It was negotiated by the plaintiffs before maturity. There was evidence admitted, without objection, that the agent of the plaintiffs agreed beforehand to take this note in payment, but this evidence was contradicted and the authority of the agent to make the agreement denied. In all this, however, there was abundant evidence of an express agreement that the note should be deemed payment. Under such an agreement, it is immaterial whether the sale and taking of the note were separate transactions or not, and whether the transaction, in whole or in part, is governed by the law of New York.

The instructions of the court, so far as they were unfavorable to the plaintiffs, were well adapted to the case, and are not open to the plaintiffs' exceptions. The requests for specific instructions, which were presented before the judge's charge, were all properly refused, part of them for the reasons above given, and part of them because they were based on the assumption of a fact which was in controversy, and took from the jury a question which it was for them to decide upon the evidence.

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Of the several requests which were presented after the charge, the first and second were properly refused, because they disregarded the element of the conduct and declarations of the plaintiffs after receiving the order, which were evidence of a ratification of the agent's acts from which, in connection with a former transaction, previous authority to the agent might be fairly inferred. It is a sufficient answer to the third and fourth that the ratification of the agent's authority is sufficient so far as the defendants are concerned, if the plaintiffs accepted, without objection, what they had reasonable ground to believe was the result of his agency. Story on Agency, § 259.

As to the fifth request: The rule in Massachusetts is that the giving of a negotiable promissory note is evidence of payment of a preëxisting debt, and sufficient where there is nothing to defeat the inference, or show that such was not the intention of the parties. In the absence of evidence, the same rule must be held to prevail in Maine. In New York and some other states, to give it that effect, there must be some additional evidence that such was the intention. The Massachusetts rule was applied to the note of a third person given for a preëxisting debt in *Wiseman* v. *Lyman*, 7 Mass. 286, and was recognized as so applicable in *French* v. *Price*, 24 Pick. 13, 21, and in *Butts* v. *Dean*, 2 Met. 76. It is too late for this court to change the rule.

As to the sixth request: The fact, that the defendants paid the freight to Portland and were allowed for it, is a circumstance of trifling importance upon the question of delivery, which the judge was not required to rule upon.

As to the remaining requests relating to the law of New York: The laws of another state must be proved as facts are proved; although the construction of the evidence admitted, when it consists of a single statute or judicial opinion, is, as in the case of other written documents, for the court. *Kline* v. *Baker*, 99 Mass. 253. The judge in this case instructed the jury that the official report of the case decided in New York was evidence of the law of that state, and that, in the absence of conflicting evidence, the law so proved was to be taken to be the law of New York at the present time. His further remark was not excepted to, and appears to have been intended to indicate

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to the jury that, while it was for the court to construe the opinion, it was for the jury to determine the sufficiency of the evidence to prove that that opinion expressed the law of New York.

All the requests for instructions were properly refused. A single exception to the admission of evidence remains. After the maturity of the note and after the plaintiffs had taken it up, the makers of the note were declared bankrupt. The defendants were permitted to prove, for the purpose of showing that the plaintiffs had treated the note as their own, and had accepted it in payment, that after this action was brought they had proved the note in their own name against the estate in bankruptcy. The evidence was competent. All that was done by the plaintiffs with the note, as well before as after action brought, was at least admissible, however much the weight of the evidence might be diminished by the suggestion that it was the duty of the plaintiffs as mere depositaries to prove the note for the benefit of all parties interested. There was no request by the plaintiffs that this evidence should be limited or qualified by the judge. *Exceptions overruled.*

JOHN FOSTER *vs.* RICHARD S. COX.

Suffolk. April 4. — June 29, 1877. AMES & LORD, JJ., absent.

Under the Gen. Sts. *c.* 150, § 1, no lien can be maintained for labor performed or furnished, under an entire contract, partly on the land described in a petition therefor, and partly on adjoining land.

PETITION, under the Gen. Sts. *c.* 150, to enforce a mechanic's lien for labor performed and furnished upon four dwelling-houses owned by the respondent, and situated in that part of Boston formerly Dorchester. Trial in the Superior Court, before *Bacon*, J., without a jury, who allowed a bill of exceptions in substance as follows:

On the evidence submitted, the judge found as a fact that the labor and services, for which the petitioner claimed his lien, were performed upon contiguous lots, numbered 3, 4, 5 and 6, upon

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a plan produced, by virtue of a contract between the petitioner and the respondent, whereby the petitioner was to build, at certain fixed rates, cellars upon a certain number of lots, specified by the contract, and did build, under the contract, cellars upon the lots above named. The judge also found as a fact that the statement of the petitioner, filed pursuant to the Gen. Sts. *c.* 150, § 5, described the lots, numbered 3, 4, 5 and 6, as the property intended to be covered by the lien.

In the petition, the lien was claimed by the petitioner on the lots numbered 3 and 4 for a balance of account for labor performed on lots numbered 3, 4, 5 and 6.

The judge thereupon ruled that the petitioner could not maintain his lien in the manner claimed in his petition, and ordered judgment for the respondent. The petitioner alleged exceptions.

J. F. Brown & M. H. Swett, for the petitioner.

J. D. Thomson, for the respondent.

SOULE, J. The petitioner seeks to enforce a lien on the land described in his petition for labor performed in "building cellars" on that land, in part, and partly on the land adjoining. The whole labor was done under an entire contract, so that, if the respondent was the owner of all the land on which the petitioner labored, a lien might have been enforced on the whole, under a proper petition. *Wall* v. *Robinson*, 115 Mass. 429. *Worthley* v. *Emerson*, 116 Mass. 374.

There is nothing in the case presented, from which it can be ascertained what part of the balance of account due the petitioner arose from labor performed on the land described in the petition. It does not appear affirmatively, that the land not described in the petition, on which a part of the labor was done, was owned by the respondent. But whether he was the owner or not, no lien can be maintained on the land described, for labor performed on land not included in the petition, though it be contiguous to the parcel described. *Rathbun* v. *Hayford*, 5 Allen, 406. *Landers* v. *Dexter*, 106 Mass. 531. *Stevens* v. *Lincoln*, 114 Mass. 476. *Exceptions overruled.*

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GEORGE McCONNELL *vs.* DEXTER BLOOD.

Suffolk. March 29. — June 30, 1877. AMES & LORD, JJ., absent.

A mortgage of a building covers an engine and boiler, a steam-gauge, a water tank, a steam-pump connected therewith, and the shafting therein, intended to permanently increase the value of the building for occupation; but not machines which are incidental merely to the particular business carried on in the building at the time, although some of them are attached to the building by nails or bolts.

TORT for the conversion of machinery. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

The plaintiff claims title as assignee of one Cunningham, under a composition with his creditors; the defendant, as mortgagee of certain real estate used by Cunningham as a shoe-shop, in which the machinery was situated and used by Cunningham. The only question at issue is whether the machines enumerated below are personal property and passed to the plaintiff as against the defendant, who has foreclosed his mortgage; or fixtures which the defendant, as mortgagee, can hold. The machines, and the manner of their attachment to the building, are as follows:

"1. A Baxter upright steam-engine and boiler, ten-horse power, resting on a layer of brick on the lower floor; the floor rests upon blocks which rest upon the brick walls of a tank built into the soil for the purpose of supplying the engine with water, the engine above the boiler being bolted through the timbers of the floor above by two iron bolts. The total height of the boiler and engine is eight feet and two inches, the height of the boiler is five feet, the circumference of the boiler twelve feet eight and one half inches, the diameter of the balance-wheel thirty inches, and the diameter of the driving-wheel twenty inches. Steam-pipes for heating the building are connected with the boiler, and the exhaust-pipe and blow-pipe pass off through the floor below the boiler. The engine and boiler could be detached from the building, for use elsewhere, without damage to the building, but in order to remove them from the building it would be necessary to enlarge two doorways, one of them being the outer door.

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2. A steam-gauge, connected with the engine by an iron pipe, and fastened to a piece of plank nailed to the flooring timbers above.

3. A steam-pump, bolted to a plank bench, which bench is nailed to the studding of the building and to the floor, and is connected by pipes with a tank, upon the floor above, that furnishes water for the boiler, and with another tank in the attic, that furnishes water for general uses.

4. One sole-leather stripping machine. 5. One sole-leather splitting machine. 6. One sole-cutting machine. These three machines are heavy iron machines, not fastened to the floor by bolts or screws, but belted downward to the shafting under the floor; being so belted downward, it is unnecessary to bolt them to the floor for use.

7. One sole-leather rolling machine, attached in the same manner as the last three machines, except that in addition a small wooden table is attached to the machine, and is nailed to a post of the building and to the floor, so that to take down the machine it would be necessary to remove the table.

8. One small iron welt-splitting machine, bolted to a bench which is nailed to the floor and to the walls of the building, and is bolted downward to shafting below the floor.

9. A buffing-machine, consisting of a wooden frame with buffing-wheels and iron pulleys, the pulleys being belted through the floor to shafting below, and the frame being nailed to the floor and the wall of the building.

10. An upper-leather splitting machine. 11. A skiving machine. 12. A strap-cutting machine. 13. A welt-cutting machine. These four are small iron machines screwed to a table which is nailed to the floor, and the machines are belted to the shafting above.

14. One siding-machine, standing on a bench nailed to the floor and the side of the building, belted to shafting below through the floor, and connected by a steam-pipe with the boiler two stories below, for the purpose of melting wax.

15. Three stitching-machines, small iron machines resting on the same bench and belted down in the same manner as the siding-machine.

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16. One eyeleting machine, a small foot-power machine, screwed to a plank which is nailed to a post of the building, the treadle being nailed to the floor, and working on an iron staple in the post.

17. One punching machine, a small iron machine for punching eyelet holes, screwed to the same bench as the stitching machines, and belted down in the same manner.

18. An upper-leather rolling-machine, a heavy iron machine bolted to the floor below and belted to the shafting above.

19. One water-tank, in the attic, a section of an iron boiler resting by its own weight, fed by a pipe from the steam-pump, and distributing water by other pipes through the building for general use.

20. All the shafting in the building. This runs in iron hangers bolted to the floor timbers.

For such of the machinery held by the court to be personalty the plaintiff was to recover, the damages to be assessed by an assessor.

B. Dean, for the plaintiff.

W. S. B. Hopkins, for the defendant.

SOULE, J. The rights of these parties are determined by the rules which apply between mortgagor and mortgagee. Many things which, as between landlord and tenant, would be removable as chattels, are regarded as part of the realty, in favor of a mortgagee. In ascertaining what articles have become part of the realty, regard must be had to the manner in which, the purpose for which, and the effect with which, they are annexed. *McLaughlin* v. *Nash*, 14 Allen, 136. *Pierce* v. *George*, 108 Mass. 78. Whatever is placed in a building by the mortgagor to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes part of the realty, though not so fastened that it cannot be removed without serious injury either to itself or to the building. On the other hand, articles which are put in merely as furniture are removable, though more or less substantially fastened to the building. So, too, machines not essential to the enjoyment and use of a building occupied as a manufactory, nor especially adapted to be used in it, are removable, though fastened to the building, when it is clear that the purpose of fastening them is

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to steady them for use, and not to make them a permanent part of or adjunct to the building. *Winslow* v. *Merchants Ins. Co.* 4 Met. 306. *Hellawell* v. *Eastwood*, 6 Exch. 295. *The Queen* v. *Lee*, L. R. 1 Q. B. 241. *Pierce* v. *George*, above cited.

The engine and boiler, which were put in to supply the premises with power; the steam-gauge, which is essential to the safe use of the same; the water-tank, for supplying the building with water for general use; the steam-pump connected therewith, and the shafting, are evidently designed as permanent additions to the realty, and could not be removed without seriously injuring the value of the building for use.

The other articles named in the agreed facts are in no way essential to the enjoyment of the estate; they are incidental merely to the particular business carried on at the time; and, though some of them are affixed to the building by nails or bolts, it is clear that the object of affixing them is only to secure them so that they may be advantageously used, and not to make them permanent parts of the building. They are therefore chattels; and for their value, to be ascertained by an assessor, there must be *Judgment for the plaintiff.*

EDWIN M. BIGELOW *vs.* CITY OF BOSTON.

Suffolk. April 3. — June 30, 1877. AMES & ENDICOTT, JJ., absent.

The board of aldermen of the city of Boston has no authority, since the enactment of the St. of 1871, *c.* 382, to assess a betterment tax for the widening of a street ordered before the passage of that act.

CONTRACT to recover back the amount of a betterment tax, assessed by the board of aldermen of the city of Boston, upon the estate of the plaintiff, fronting on Shawmut Avenue, and paid under protest.

The case was submitted to this court upon an agreed statement of facts in substance as follows:

By an order passed by the board of aldermen of the city of Boston on August 29, 1870, and approved by the mayor on October 10, 1870, Shawmut Avenue was widened and extended

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from Dover Street to Tremont Street, taking a part of the plaintiff's land. The board of street commissioners was duly organized and entered upon the discharge of its duties upon the first Monday of January, 1871, in pursuance of the St. of 1870, *c.* 337. On October 7, 1872, the board of aldermen adjudged the benefit and advantage to the remainder of the plaintiff's land by the widening to be $10,000, and assessed thereon $5000.

If upon these facts the plaintiff was entitled to recover, judgment was to be entered for him for $6093, with interest; otherwise, judgment for the defendant.

E. M. Bigelow, pro se.

H. W. Putnam, for the defendant.

SOULE, J. Whenever jurisdiction of a subject matter is transferred by statute from an existing tribunal to a new one, the original tribunal loses, at once, all power to originate proceedings in relation to that subject matter, and, unless the statute contains a provision that it shall not affect pending proceedings, all right to complete proceedings already in progress. This is so, whether the statute repeals the law which gave jurisdiction to the original tribunal in express terms, or only by implication. *New London Northern Railroad* v. *Boston & Albany Railroad*, 102 Mass. 386.

The St. of 1871, *c.* 217, provides that "whenever any real estate shall be liable to assessment on account of the benefit or advantage it has received by the laying out, widening, extending, discontinuing, grading or altering of any street or highway, such assessment shall be made, in the city of Boston, by the board of street commissioners."

The power to make such assessments had previously been vested in the board of aldermen of the city. The statute does not contain any reservation to the aldermen of authority to make assessments of benefits received from the laying out or widening of streets before the passage of the act, and expressly repeals all acts and parts of acts inconsistent with its provisions. The St. of 1871, *c.* 217, was repealed by the St. of 1871, *c.* 382, which vested all power to make such assessments in "the board of city or town officers authorized to lay out streets," so far, at least, as concerned streets laid out after the passage of the act; and so far as concerns streets laid out before its passage, as to

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which proceedings for assessing betterments had not been instituted, unless, as is contended by the defendant, the proceedings for assessing betterments are so far a part of the laying out or widening that they are, within the meaning of the saving clause of the statute, a "case pending," although no step has been taken in relation thereto.

The assessment of betterments is not a part of the proceedings of laying out or widening a street, but is a new and independent proceeding, of an entirely different character, being the assessment of a tax. *Harvard College* v. *Aldermen of Boston*, 104 Mass. 470. *Prince* v. *Boston*, 111 Mass. 226. Whether the St. of 1871, *c.* 217, did or did not transfer to the street commissioners jurisdiction to assess betterments incident to the widening ordered before its passage, no jurisdiction remained in the board of aldermen to make such assessment after the enactment of *c.* 382, which repealed, in terms, all the statutes by which authority to assess betterments was given to the board of aldermen. Under the saving clause "such repeal shall not affect any rights or liabilities already incurred;" authority to make assessments, which might have been made by the aldermen, is transferred to the street commissioners; while the clause as to pending cases permitted the aldermen to complete all assessments which were in progress before them when the statute took effect.

As, for these reasons, we think the assessment on the estate of the plaintiff to have been laid without authority, under the agreement of the parties, there must be

Judgment for the plaintiff.

CENTRAL NATIONAL BANK *vs.* JOHN O'CONNOR & others.

Suffolk. April 5. — June 30, 1877. AMES & LORD, JJ., absent.

If, under the Gen. Sts. c. 124, § 13, notice of an intention to take the poor debtor's oath is served by leaving a copy at the last and usual place of abode of the officer making the arrest, not less than twenty-four hours, in addition to the time allowed for travel, are, under the St of 1861, c. 112, to be allowed the officer before the time appointed for the examination.

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CONTRACT on a recognizance entered into, under the Gen. Sts. c. 124, § 10, on January 5, 1876, by the first named defendant as principal, and the other defendants as sureties, and conditioned that O'Connor, who had been arrested on an execution in favor of the plaintiff, should, within thirty days from the time of his arrest, deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided by law, and appear at the time fixed for his examination, and from time to time until the same was concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon.

The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, on an agreed statement of facts in substance as follows:

Within the thirty days, O'Connor caused a notice of his desire to take the oath for the relief of poor debtors on February 4, 1876, at seven o'clock in the forenoon, in Marlborough, in the county of Middlesex, to be served on the plaintiff, on February 3, 1876, at fifteen minutes after four o'clock in the afternoon, by leaving a true and attested copy thereof at the last and usual place of abode, in Framingham, of the officer who made the arrest. Neither the plaintiff nor its agent or attorney resided or had a place of business in the county of Middlesex. The distance from the place of service to the place of hearing was not less than ten miles. O'Connor appeared before the magistrate at the time and place stated, remained until the expiration of the hour, and was then discharged, neither the plaintiff nor any one in its behalf appearing.

B. D. Washburn, for the plaintiff.

W. B. Gale & J. E. Cotter, for the defendants.

SOULE, J. The plaintiff contends that the judgment of the Superior Court in favor of the defendants was wrong, on the ground that the principal in the recognizance sued on failed to obtain a valid discharge, on his application to take the poor debtor's oath, because no proper service of notice thereof was made.

The only service was by leaving a true and attested copy at the last and usual place of abode of the officer who made the

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arrest, less than fourteen hours before the time appointed for the examination. The St. of 1861, *c.* 112, provides that "whenever the notice, permitted by the thirteenth section of the one hundred and twenty-fourth chapter of the General Statutes, shall be served by leaving a copy thereof at the last and usual place of abode of the plaintiff or creditor, his agent or attorney, not less than twenty-four hours shall be allowed before the time appointed for the examination." This has been held to mean that the creditor is to be allowed not less than twenty-four hours in addition to the time allowed for travel. *Way* v. *Wheeler*, 112 Mass. 87. This statute makes no mention of service by leaving a copy at the place of abode of the officer, and it is contended that, therefore, a service which would have been seasonable, if made in that way, before this statute, is good since. The Gen. Sts. *c.* 124, § 13, provide that the notice shall be served by giving to the "plaintiff or creditor, his agent or attorney, an attested copy thereof, or by leaving such copy at the last and usual place of abode of the plaintiff or creditor, his agent or attorney, allowing not less than one hour before the time appointed for the examination, and time for travel at the rate of not less than one day for every twenty-four miles' travel," and that, if the creditor is not a resident of the county where the arrest is made, and "no such attorney or agent is found within the county, the notice may be served on the officer who made the arrest." This section gives no express direction as to the allowance of time when service is made on the officer. It has been held, however, to be the reasonable interpretation of the section that the time is to be computed in case of service on the officer, as in the case of service on the creditor or his attorney. *Homer* v. *Sinnott*, 119 Mass. 191. The St. of 1861, *c.* 112, adds twenty-three hours to the time to be allowed when service is by copy left at the last and usual place of abode of the creditor, his agent or attorney. It would seem to be the reasonable interpretation of this statute, that the allowance of time therein specially provided for, in the case of service by leaving a copy at the place of abode of the creditor or his attorney, is to be made in the case of service by copy at the place of abode of the officer. Service in this way on the officer, is permitted wholly in the interest of the debtor; and it cannot be supposed, in the absence of any

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express provision, that the Legislature intended that less time should be allowed before the examination when service is made by copy, at the place of abode of one who has no interest in nor duty concerning the matter, than when the service is made by copy at the place of abode of the creditor himself. We are of opinion, therefore, that the ruling in favor of the defendant was erroneous, and there must be

Judgment for the plaintiff.

JOHN G. BLUNT *vs.* HENRY A. NORRIS.

Suffolk. March 27, 1876. — July 3, 1877. LORD & SOULE, JJ., absent.

A, for the purpose of enabling B. to raise money for him, made a promissory note payable to the order of B., and executed to him a mortgage of land, as security therefor, which was duly recorded. B., without A.'s knowledge or consent, and to secure his own debt, delivered the note unindorsed to C., and afterwards assigned the mortgage and a note, procured from A. by artifice, to D. for value. *Held*, that C. was not, in the absence of fraud on the part of D., entitled in equity to an assignment of the mortgage.

BILL IN EQUITY for the assignment of a mortgage to the plaintiff, or that the same might be declared to be held in trust for him, and for an injunction to restrain the defendant from transferring the same. The case was heard before *Endicott*, J., on the pleadings and a report of a master, and reserved for the determination of the full court, and was as follows:

On or about January 31, 1872, George W. Gerrish executed a mortgage of land in Brighton to Samuel S. Jackson, a real estate broker of Boston, to secure the payment of a promissory note of $2500, of even date with the mortgage, payable to Jackson or order, and stating on its face that it was secured by mortgage of land in Brighton. The mortgage was duly recorded on February 12, 1872. The note and mortgage were given to Jackson, not in payment of, or to secure, any preëxisting debt, nor did Gerrish, at the time or afterwards, receive anything thereon from Jackson, but they were to be negotiated by Jackson, for Gerrish, who wanted to raise money thereon.

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On April 25, 1872, Jackson, being indebted to the plaintiff, delivered to him, without the consent or knowledge of Gerrish, the mortgage note, without indorsement, to hold as collateral security for $1500. The plaintiff received the note in good faith, and Jackson paid him, semiannually, the interest on the $1500, and indorsed it on the note to July 31, 1875.

Shortly before July 1, 1872, Gerrish called at Jackson's office, and was asked by his clerk to sign a note, so that Jackson could get the money for him. Gerrish said that he signed the note when he executed the mortgage, to which the clerk replied that Jackson said not. The clerk thereupon wrote a note similar to that described in the mortgage, and Gerrish signed it. Afterwards, about July 1, 1872, the defendant having agreed to lend Gerrish $2000 on the mortgage, Gerrish called at Jackson's office, and got from him the mortgage, and an assignment thereof, under seal, to the defendant, and the last named note, indorsed by Jackson, without recourse, and delivered them to the defendant, as collateral security for a note at three months for $2000; and the defendant accepted them in good faith, and not supposing that any one else had any claim on the mortgage. The defendant did not record the assignment of the mortgage to him until November 13, 1875. Neither the plaintiff nor the defendant has received the principal sum advanced by each respectively.

R. D. Smith, for the plaintiff, to the point that the plaintiff was entitled to the relief sought, notwithstanding the fact that the note was not indorsed, cited *King* v. *Harrington*, 2 Aik. 33; *Pratt* v. *Bank of Bennington*, 10 Vt. 293.

W. A. Herrick, for the defendant.

AMES, J. The claim of the plaintiff is that, as he acted in good faith, and received the note without notice of any fraud or want of authority on the part of Jackson, the transfer of the note operated as an equitable assignment of the mortgage also. But, as the note was not indorsed to the plaintiff, it could only be sued in the name of Jackson, and was subject to all equities against him; and, even upon the supposition that, so far as it was a matter between the plaintiff and Jackson, the mortgage might be considered as subject to a trust in favor of the plaintiff to the extent of the money which he had advanced, yet he

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acquired no right as against the defendant, who was a purchaser for a valuable consideration, and without notice of any claim of the plaintiff.

It appears that, although the mortgage had remained for about five months in the hands of Jackson, nothing had been done in the way of raising money for the use of the mortgagor, until the defendant agreed to advance the money upon it. As Jackson at that time was unable to produce the original note, he was driven to the subterfuge that the note intended to go with the mortgage had never been signed at all. The mortgagor in this way was induced to give what was in fact a new note. There can be no doubt that this new note was the one, and the only one, which the mortgagor intended to secure by the mortgage, and that he did not suppose that there was another note of the same tenor and date in existence. We see no ground for the plaintiff's claim that this new note so given was a spurious note. Up to the moment of the assignment to the defendant, the mortgage was subject to the control of the mortgagor. Jackson was his agent or servant for the purpose of negotiating or transferring it to the actual lender of the money, and with no authority to do anything more. The defendant was dealing with a mortgage which, so far as the public records furnished any indication, was one which the assignment from Jackson would transfer to him, absolutely and free of any incumbrance. While acting in good faith and paying a valuable consideration, he had a right to rely upon the record. "In the absence of fraud, a conveyance by the party who appears on the record to be the owner of the mortgage should be sufficient to protect a purchaser who has no actual or constructive notice of title in any other." *Welch* v. *Priest*, 8 Allen, 165. See also *Young* v. *Miller*, 6 Gray, 152; *Warden* v. *Adams*, 15 Mass. 233; *Wolcott* v. *Winchester*, 15 Gray, 461. *Bill dismissed.*

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NATHAN MORRIS & another *vs.* JOSIAH BACON.

Suffolk. Nov. 22. 1876. — July 3, 1877. AMES & SOULE, JJ., absent.

A. made a promissory note payable to the order of B., and executed to him a mortgage of land as security therefor, which was duly recorded. B. indorsed the note to C., and afterwards assigned the mortgage to D., and delivered to him another note similar in terms to the one described in the mortgage. Both C. and D. acted in good faith, and each paid a valuable consideration to B. *Held*, that C. was entitled in equity to an assignment of the mortgage from D.

BILL IN EQUITY by Nathan Morris and the Tremont National Bank of Boston against Josiah Bacon, for the assignment to the bank of a mortgage made by Morris to Abraham Jackson. Hearing upon the pleadings and proofs before *Devens*, J., who made a decree for the bank, from which the defendant appealed. The facts appear in the opinion.

F. V. Balch, for the bank.

C. Browne & Jabez S. Holmes, for the defendant.

LORD, J. On April 1, 1870, the plaintiff Morris made a promissory note for the sum of $4000, payable to the order of Abraham Jackson in five years from that date, and executed a mortgage at the same time of certain land in Boston to Jackson, to secure the payment of the note, and delivered both note and mortgage to Jackson, who caused the mortgage to be recorded on April 5, 1870. On or about October 21, 1872, Jackson indorsed the note to the Tremont National Bank as collateral security for a loan to a larger amount, made at that time by the bank to him, stating at the time that the note, which upon its face purported to be secured by mortgage, carried the mortgage with it.

This was the condition of the title to the note and mortgage on or about March 2, 1875. The plaintiff bank was owner of the note, and Jackson had the legal title to the mortgage in trust for the bank. On that day Jackson undertook to sell the note, with its security, to the defendant. He had, however, neither the title, nor the possession of the note, nor any authority to sell the same. He could therefore convey no title to it. In order to seem to have a title which he could convey, he fraudulently substituted another note for the note which the mortgage was

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made to secure. This fraudulent substitution could give no right against the maker or the owner of the note. Neither Jackson nor the defendant could by any act, in the absence of the plaintiffs, convert the mortgage into a security for any other than the note which it was made to secure. Jackson fraudulently attempted to apply the mortgage to a note which it was not given to secure. Neither of the plaintiffs did anything, or allowed anything to be done, in furtherance of the fraud. If the plaintiff Morris had paid the note between 1870 and 1875, leaving the mortgage still in the hands of Jackson undischarged, no one would contend that Jackson could by any mode have made the mortgaged property liable to a new debt. No person could derive from Jackson any title under that mortgage, except a title as collateral security for the debt. If the debt itself was not in existence, the assignee could take under any circumstances, at most, only a naked legal title to the mortgage; if the debt existed, and was not transferred to the mortgagee, the mortgage would be held only in trust for that debt, not for a different debt. That the debt is the principal and the mortgage an incident, is a rule too familiar to require citations in support of it.

Assuming, for the sake of argument, that the note held by the defendant is a genuine note, the case finds that it is not the note which the mortgage was given to secure; and the plaintiff Morris has never created a lien upon his estate in favor of that debt, and it cannot be contended that Jackson could by any act of his create such a lien. If the holder of the true note had in fact consented that the mortgage might be assigned to the defendant as collateral security for another note of the same tenor and date, that could not have made it so. Whether in equity it might have operated as a conveyance of the true debt to the defendant we need not decide, for there is no claim or pretence that such holder did thus consent. There was simply neglect on the part of the plaintiff bank to take an assignment of the mortgage. The utmost hazard which the holder took was that Jackson might discharge the mortgage, in which case the note would still be a valid security; or Jackson might pass the legal title to another, who in law would become the trustee of the owner of the note.

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This case is quite distinguishable from *Blunt* v. *Norris*, *ante*, 55. In that case the plaintiff acquired no rights beyond those of Samuel S. Jackson, who never owned the note, and who passed it, without indorsement, against the rights of the maker, so that there was no debt of the maker to which the mortgage could be incident. In this case Abraham Jackson was the *bonâ fide* owner of the note and the mortgage security, and transferred the note by indorsement before maturity, with the assurance that it was secured by mortgage. *Decree affirmed.*

ELIZABETH F. STRONG *vs.* ABRAHAM JACKSON & others.

Suffolk. Nov. 21, 22, 1876. — July 3, 1877. AMES, ENDICOTT & SOULE, JJ., absent.

If one who holds, by an assignment duly recorded, a mortgage and a note indorsed in blank, purporting on its face to be secured by it, "the same being collateral to" a certain note, assigns the mortgage, and afterwards indorses the note for which it was collateral, retaining the mortgage note, to another, by an assignment in like words duly recorded, he conveys a title to the mortgage debt, except as against an innocent purchaser for value without notice; and one, to whom he subsequently passes the mortgage note and fraudulently assigns the mortgage upon a separate paper as collateral security for a loan, is not such a purchaser.

BILL IN EQUITY by Elizabeth F. Strong against Abraham Jackson, his assignees in bankruptcy, Edwin E. Kingsley, the Tremont National Bank, the First National Bank of Boston and John McQuaid, to redeem a mortgage.

At the hearing, before *Endicott*, J., the parties agreed that such decree might be entered, without regard to the form of the pleadings, as the court should think proper, on the facts, to decide their respective rights, and, there being no fact in dispute, the judge reserved the case for the consideration of the full court. If the plaintiff was entitled to redeem, the case was to be sent to a master. The facts appear in the opinion.

J. Fox, for the plaintiff.

R. M. Morse, Jr. & *F. V. Balch*, for the Tremont National Bank.

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W. G. Russell & G. Putnam, Jr., for the First National Bank.

LORD, J. We have again to decide which of several persons who have done no wrong shall suffer by reason of the fraud of Abraham Jackson. The plaintiff, on April 28, 1874, was the owner of a note made to her by John McQuaid for the sum of $3500, which note was secured by a first mortgage upon certain land in Boston. On June 30, 1874, her son in law, Edwin E. Kingsley, desired to borrow of Abraham Jackson the sum of $3200, which Jackson agreed to lend upon receiving an assignment of said mortgage as collateral security therefor. The plaintiff, to accommodate her son in law, assented to this, and executed an assignment of said note and mortgage to Jackson on that day. The assignment in terms expressed "the same being collateral to Edwin E. Kingsley's note for $3200, dated June 30, 1874." The mortgage note was indorsed by the plaintiff in blank.

On January 7, 1875, Jackson assigned the mortgage to the Tremont National Bank as security for a previous debt of his to the bank, indorsing the Kingsley note in blank and passing that and the assignment of the McQuaid mortgage to the bank, but retained in his own possession the McQuaid note. The assignments to Jackson and from Jackson to the Tremont Bank were recorded, and the latter contained the same language as the former, "the same collateral to Edwin E. Kingsley's note for $3200, dated June 30, 1874."

On January 25, 1875, Jackson passed the McQuaid note with his blank indorsement to the First National Bank, as collateral security for a loan then made by said bank to him. He also, upon a separate paper, assigned the McQuaid mortgage to said bank, in which no reference was made to the Kingsley note.

In this condition of things, the First National Bank contends that it has the right to hold and collect the McQuaid note to its own use, and to have a decree that the Tremont National Bank hold the mortgage in trust for the benefit of said First National Bank. The Tremont National Bank asks for a decree that the First National Bank shall hold the McQuaid note in trust for it as collateral security for the Kingsley note, and to convey the same to it, so that it may be surrendered to the plaintiff upon the payment of the Kingsley note. The plaintiff

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desires a reassignment to herself of the mortgage and note, upon the payment of the Kingsley note, for which she pledged it.

The assignment by Jackson to the Tremont National Bank of the McQuaid mortgage, by which in terms he sold and transferred "the mortgage deed, the real estate thereby conveyed, the promissory note, debt and claim thereby secured, and the covenants in said mortgage contained," made the McQuaid note, as between himself and the bank, the property of the Tremont National Bank. It became the property of said bank, not only as against Jackson, but as against all the world except a *bonâ fide* purchaser for value and without notice. The First National Bank claims to be such holder, and unless it is, it has no claim upon the note. Is that bank such a holder? This involves perhaps as much an inference of fact as a principle of law, or rather a mixed question of law and fact; but whether an inference of fact or a question of law, upon the reservation in equity by a single justice, the full court must decide it. *Parks* v. *Bishop*, 120 Mass. 340. The claim of the First National Bank is that the note is a negotiable promissory note, not matured, and that there was nothing to indicate that it was not what it seemed to be, and nothing to show that Jackson was not the owner of it and authorized to deal with it; and that, although it purported to be secured by mortgage, yet, as held in *Morris* v. *Bacon*, *ante*, 58, the mortgage is but an incident to the debt, and whether the mortgage is or is not available is a risk which the assignee of the debt is content to take.

In the cases in which the question has been whether a party to a transaction is affected with notice of other equities, it is often stated that a particular fact is or is not sufficient to charge a party with notice. For example, the cases are very numerous in which it is said that the open and exclusive possession of real estate is notice to a subsequent purchaser of the equities of the person thus in open possession; the cases are perhaps equally numerous in which it is said that such possession is not notice. And so of a variety of other independent facts. These cases are perhaps as fully cited in Sugden on Vendors, (8th Am. ed.) 755–765, and notes, as in any single collection of them. Upon the examination of those cases, it will be found that it is very rarely decided that any one fact is or is not con-

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clusive evidence of notice. Indeed, in the nature of things, it can scarcely happen that the question is to be decided upon an isolated fact. It may be that in a particular case some single fact in and of itself is sufficient, but generally it is not so. The question is ordinarily a broader one; it is this: Do all the facts, taken in connection with the subject matter, with the situation and relation of the parties, their means of knowledge, the circumstances which should lead to inquiry, together show such a state of facts that it would be inequitable for subsequently acquired rights to supplant rights previously acquired? In this view, a fact, which under some circumstances and some situations and relations of the parties would be insignificant, in other relations of the parties and under other circumstances would be decisive; and thus many apparently conflicting decisions will be found to be harmonious. The question is, not does any one fact, but does the whole case, disclose such a state of circumstances as that it is inequitable for a person having subsequent rights to enforce such rights against an elder title defective only by reason of some legal rule. If it does, the elder title should prevail.

It is quite clear that a note payable five years after date, with a memorandum upon it that it is secured by mortgage upon real estate, is not what by men of business is usually denominated commercial or business paper; and we think there is a material distinction between securities of this kind and strictly mercantile paper; and that such paper as this may be subject to equities, when strictly mercantile paper would not be; not that the rule of law is different, but what would attract no attention in relation to purely business paper should attract the attention in paper of this description. According to the practice which originally prevailed in relation to mortgages of real estate in this Commonwealth, the assignee of a mortgage debt would always take subject to all equities; because the evidence of the mortgage debt was then a bond. In *Crane* v. *March*, 4 Pick. 131, Parker, C. J., says: "In the form usually practised in regard to mortgages, until lately, these difficulties could not occur, for the collateral personal security was a bond, which not being assignable at law, the action upon it would be always in the name of the obligee, and the assignee in equity could avail him-

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self of no means of enforcing payment from which the obligee would be restricted." The Chief Justice proceeds to add advice, which it is to be regretted has not been followed by conveyancers: "Mortgagors may protect themselves from having their time of redemption reduced, by giving bonds, or notes not negotiable." It had been decided in *Atkins* v. *Sawyer*, 1 Pick. 351, that the mortgagee could not sell on execution the equity of redemption upon a judgment recovered upon the mortgage note, for the reason that the equity of redemption would thereby be reduced from three years to one. But in *Crane* v. *March* it was held that the assignee of one of several mortgage notes might seize and sell the equity of redemption upon execution, although the effect of such seizure and sale would be to reduce the time of redemption. In that case, and the cases which have since arisen, the difficulties have been caused by the fact that, as in this case, the note and the mortgage have been in different hands and under various circumstances; and there was nothing in the several cases to show that the holder of the note necessarily had knowledge of the mortgage, and, as is said in *Crane* v. *March*, the record "would inform him only that a note of like tenor and date was so secured." As between the original parties, the note and mortgage are but one transaction, and but one security. When, however, as in this case, the note purports upon its face to be a mortgage note, we think note and mortgage are to be construed together in determining the rights of the holder of the note.

The reference upon the note to the mortgage, under the circumstances, is of much significance; the mortgage describes the note; the note refers to the mortgage; and, in the condition of things at the time the First National Bank took the security, we think that the taker of either must take according to the true title of him who transfers it, as such title is apparent upon proper examination of it. It is to be observed, as a fact of considerable importance, that Jackson was not and did not claim to be the original mortgagee, but claimed to hold the note and mortgage by assignment. His title was on record. If the First National Bank had examined the record to see if Jackson had a title, or if it had called upon him to exhibit his title, it would have been apparent at once that he was committing a fraud.

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The assignment to him would have shown that he held the note for a purpose inconsistent with his proposed sale or transfer of it; while the record would have developed not only that fact, but the further fact that he had already disposed of the title which he originally acquired. Under this state of facts, we cannot hold that the First National Bank took the note in the ordinary course of business without notice. That bank not only took the note having then more than four years to run before maturity, but took also an assignment of the mortgage; and now, in its answer, claims a title to the said mortgage, and prays for a decree that the Tremont National Bank shall hold the same in trust for it. These facts alone are quite suggestive that the First National Bank did not take the note as mercantile paper in the ordinary course of business, but took or attempted to take note and mortgage as the evidence of the same debt with substantial reliance upon the mortgaged land. But it is impossible for this bank to trace its title, either as it actually exists, or as it appears of record, without the fraud of Jackson being manifest. Suppose it should come into court to enforce its right under the mortgage; its own case must show that the title which Jackson had was conveyed to it in fraud of the rights of the plaintiff, while the record would show that it was thus conveyed not only in fraud of the rights of the plaintiff, but also in fraud of the rights of the Tremont Bank, to whom Jackson had already conveyed his true title.

The question whether the transaction with the First National Bank was void upon the ground that it was an attempt to evade the law of the United States, which does not allow a loan to be made by a bank upon mortgage of real estate, is a question not free from embarrassment and difficulty, and one which, in the view we have taken of the case, need not be now decided. The result of our conclusion is that the First National Bank shall deliver the McQuaid note to the Tremont National Bank, and that the plaintiff be allowed to redeem from the Tremont National Bank the McQuaid note and mortgage, upon payment to the Tremont Bank of the Kingsley note.

Decree accordingly.

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CYRUS CARPENTER & others *vs.* NORTHBOROUGH NATIONAL BANK.

Suffolk. Nov. 24, 1876. — July 3, 1877. AMES, ENDICOTT & SOULE, JJ., absent.

A, through fraud, obtained from B. a promissory note signed by B., and payable to the order of C., forged the indorsement of C. and got the note discounted at a bank. On the maturity of the note B. paid it to the bank. *Held*, that B. could maintain an action against the bank for money had and received, although the bank acted in good faith in taking the note.

CONTRACT for money had and received. Trial in the Superior Court, before *Gardner*, J., who, at the request of the plaintiffs, reported the case for the consideration of this court, in substance as follows:

The plaintiffs had been engaged for many years in Boston, under the firm name of Cyrus Carpenter & Co., as manufacturers of ranges and furnaces. They had known Abraham Jackson and William Carpenter for several years, and had had business transactions with them. William Carpenter was a builder and owned some real estate and other property. Jackson had acted as his legal adviser and held a power of attorney authorizing him to collect debts due William Carpenter and to sell and convey his land. It was alleged by the defendant, but denied by the plaintiffs, that William Carpenter had also given Jackson a power of attorney to make and execute promissory notes and to use his (Carpenter's) name in any business in which he (Carpenter) was engaged; and there was conflicting evidence on this point. William Carpenter had upon some occasions left with Jackson promissory notes, signed by him in blank, which Jackson had negotiated with the plaintiffs and others. Prior to the transaction in question, the plaintiffs had exchanged notes with Jackson and William Carpenter, sometimes for the accommodation of the former and sometimes for their own accommodation. About February 15, 1875, Jackson and William Carpenter obtained from the plaintiffs, for Jackson's accommodation, three promissory notes made by them amounting in all to about $6400, one of which was for the sum of $2625. The plaintiffs received, from Jackson and William

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Carpenter, notes signed and indorsed by them in exchange for these notes. The notes were not identical in form but aggregated the same amount. A few days afterwards Jackson called alone at the plaintiffs' place of business and stated to Cyrus Carpenter that he desired to get another note from the plaintiffs for $2625, and that he could place it at less rate of discount than the former note. Cyrus Carpenter thereupon gave him a note for $2625 signed by the plaintiffs, dated February 15, 1875, payable to the order of William Carpenter in four months from date, and Jackson gave him in exchange a note for the same amount, date and time, signed by himself to the order of William Carpenter and indorsed by William Carpenter. In April, 1875, Jackson left Boston, and was subsequently adjudged a bankrupt. William Carpenter also failed and was adjudged a bankrupt. There are only nominal assets in his estate; and no dividend has been declared out of it. The plaintiffs proved against William Carpenter all of the claims held by them, including the note for $2625, given in exchange for the second note furnished to Jackson, and Cyrus Carpenter was appointed one of the assignees of his estate.

Shortly before the plaintiffs' second note for $2625 matured, the plaintiffs were notified that the same was held by the defendant, and thereupon wrote to the defendant that it would not be convenient for them to pay the note at maturity, but that they would pay twenty-five per cent. in cash and give a note for the remainder. A few days after its maturity, namely, on June 26, 1875, one Bush, the president of the defendant, called at the plaintiffs' place of business and brought the note with him. A settlement was made by the payment of $704.95 in money, and the giving of a new note by the plaintiffs for $1968.75, payable in four months from June 18, 1875. The plaintiff testified that he was familiar with the signature of William Carpenter, but that, in the conversation with the president of the defendant bank, nothing was said about the indorsement, and that he did not in fact examine it. Bush testified that Cyrus Carpenter turned the note over and looked at the indorsements. Bush was not familiar with William Carpenter's signature. Shortly after Bush had left the plaintiffs' counting-room, Cyrus Carpenter handed the note to his son, one of the

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plaintiffs and bookkeeper of the firm. The note purported to be indorsed by William Carpenter and by Abraham Jackson. The son immediately expressed the opinion that the pretended signature of William Carpenter was a forgery. The note was soon afterwards shown to William Carpenter, who pronounced his signature a forgery. The plaintiffs thereupon notified the defendant that the supposed indorsement of William Carpenter was forged, that they would require the defendant to return the money paid, and they should not pay the note for $1968.75.

The plaintiffs subsequently filed a petition in bankruptcy, and effected a composition with their creditors for ten cents on the dollar, in accordance with the provisions of the bankrupt law.

There was evidence tending to prove that the indorsement of William Carpenter to the note aforesaid was forged, that he did not know of the making of the note; and it appeared that the note was placed or passed about the time of its date by Jackson through a broker to the defendant, who discounted and took and paid the amount of the same in good faith, and there was evidence tending to prove that the proceeds of the note were used by Jackson for his own purposes.

Upon this evidence the judge ruled that the action could not be maintained, and directed a verdict for the defendant. If there was any evidence upon which the action could be maintained, the verdict was to be set aside and the case stand for trial.

R. M. Morse, Jr., (*C. P. Greenough* with him,) for the plaintiffs.

A. A. Ranney, for the defendant, cited *Farmer* v. *Arundel*, 2 W. Bl. 824; *Moore* v. *Eddowes*, 2 A. & E. 133 *n.*; *Norton* v. *Marden*, 15 Maine, 45.

LORD, J. It is to be assumed, in testing the accuracy of the ruling of the learned judge who presided at the trial, that every fact upon which there was evidence for the jury was found most favorably for the plaintiffs.

It is then to be taken that the signature of William Carpenter was forged; that Jackson misappropriated the funds which he had procured upon the forged indorsement; that William Carpenter never had knowledge that such note had been taken in his name by Jackson, and that the note was originally obtained

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from the plaintiffs by fraud. It must also be taken to be settled that Jackson had no authority to indorse the name of William Carpenter, nor to assign the note for his own benefit; and that the acts done in the premises by Jackson were done in fraud of the rights of William Carpenter and of the plaintiffs. The question then is: Could the bank acquire any title, legal or equitable, to the note thus originally obtained by fraud and passed to it, not only in fraud of the rights of the maker, but by forgery as one of the means of accomplishing the fraud? Certainly it could not.

The question sometimes discussed, whether an acceptor is bound to know the genuineness of the signature of the drawer, does not arise. Nor is it necessary to consider to what extent the rule that every party to mercantile paper warrants the genuineness of every signature preceding his is to be applied. The plaintiffs were the makers of the note. It was payable only to the order of William Carpenter. Such order was never given. The plaintiffs therefore had never promised to pay the note to the bank. The bank could not have collected the note of the plaintiffs. When the plaintiffs paid the note to the bank, they paid it under the mistaken belief that the bank was the legal owner of the note, and had the right to collect it. It was, however, immediately discovered that the bank had no such right, and notice was at once given to it that the money thus paid by mistake would be reclaimed. It is common learning that ordinarily money paid by mistake to a person not authorized to receive it may be recovered back by the person paying. The cases in which it has been held that money thus paid cannot be recovered back have been exceptions to the rule, by reason of peculiar circumstances attending the particular payments.

The case most resembling this, but less favorable to the plaintiffs, is that of *Canal Bank* v. *Bank of Albany*, 1 Hill, 287. That was the case of the acceptor of a draft in favor of one Bentley; the name of Bentley was forged; subsequently the draft was indorsed by several innocent parties; and it came into the hands of the defendant bank for collection on account of another bank. Upon notice, the acceptor paid the draft to the defendant bank, which did not disclose the fact of its agency, which bank paid the amount over to its principal. Several weeks afterwards it was

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discovered that the name of Bentley was forged, too late to give notice to the indorsers, and after payment to the principal. It was held that the money could be recovered back of the defendant, notwithstanding the defendant had paid it over without notice, and notwithstanding that the indorsers could not be notified of the refusal or the failure of the acceptor to pay. It was said that, inasmuch as each subsequent indorser had paid for the draft under a mistake of fact, supposing it to be a genuine instead of a forged indorsement, he could recover the amount which he paid of the person to whom he paid it. It is not neccessary for us to consider whether or not the rule thus laid down is sound, for the reasons, first, that no such question arises in the present aspect of the case, nor can it arise in this case, inasmuch as Abraham Jackson, the assumed forger of the indorsement, was the only indorser of the note against whom any claim could arise as indorser; and neither law nor equity could require that notice should be given to Jackson, to fix his liability upon a note which he had passed by his own forgery of an indorsement.

Inasmuch, therefore, as in this case there are none of the elements which have been held to bring a case within the exceptions to the general rule, an examination of the exceptions to the rule is unnecessary. This is simply the payment of a note to a party who has no legal and no equitable interest in the promise of the maker, whatever its rights may be as against Jackson, whose name is upon the same paper. The money having been paid by mistake to a person who had no right to demand it, the case is within the general rule, and the party paying may recover back the amount thus paid. This principle has been recognized in various decisions in this Commonwealth. See *Merriam* v. *Wolcott*, 3 Allen, 258; *Merchants' National Bank* v. *National Eagle Bank*, 101 Mass. 281; *Boylston National Bank* v. *Richardson*, 101 Mass. 287; *National Bank of North America* v. *Bangs*, 106 Mass. 441. *Verdict set aside.*

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THOMAS J. WELCH *vs.* WILLIAM H. GOODWIN.

Suffolk. Nov. 24, 1876. — July 3, 1877. AMES, ENDICOTT & SOULE, JJ., absent.

An agent of an undisclosed principal may be treated as the principal.

If a person pays a promissory note through mistake, supposing the signature upon the note to be his genuine signature, he may, on discovering it to be forged, maintain an action to recover back the money paid, if he is not guilty of laches whereby the situation of the other party is changed to his injury.

The situation of a person, to whom money is paid by mistake on a forged note, is not changed to his injury by the fact that, on payment, he transfers to the payer a mortgage which he received as collateral security for the note, and which, with the note, he took in good faith, supposing the note to be genuine, the mortgage having been given as security for another note, of which the forged note was a copy.

CONTRACT for money had and received. The declaration also alleged that the defendant was the holder of a certain promissory note purporting to be signed by the plaintiff, and payable to the order of and indorsed by Abraham Jackson, for the sum of $2000; that on July 8, 1875, the plaintiff, supposing the note to be genuine, and the signature of the maker upon it to be his own signature, at the request of the defendant and before the note was due, paid the defendant the full amount of the note, with interest thereon, namely, the sum of $2053; that the note was not genuine; that he never signed or executed it; that his name signed thereto was a forgery, and not made by him or with his knowledge or consent; that, immediately upon his discovery of this fact, he notified the defendant and demanded repayment of the sum so paid. Annexed to the declaration was a copy of the note, as follows:

"$2000.00. Charlestown, March 1st, 1873.

"For value received I, Thomas J. Welch, promise to pay to Abraham Jackson or order the sum of two thousand dollars in three years from this date, with interest to be paid semiannually at the rate of eight per centum per annum.

"In presence of Thomas J. Welch.
Wm. T. Canavan.

"Indorsed, Abraham Jackson."

Trial in the Superior Court, before *Gardner*, J., who reported the case for the determination of this court in substance as follows:

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It appeared that in March, 1873, the plaintiff borrowed of Abraham Jackson the sum of $2000, and gave therefor to Jackson his note, a copy of which is annexed to the declaration, and, as security therefor, a mortgage upon a certain parcel of real estate owned by him, which mortgage was recorded on April 1, 1873; that prior to February, 1875, Jackson was largely indebted to the Eliot National Bank, of Boston, of which the defendant then was and ever since has been the president; that, among other indebtedness, the bank held a note for $4500 of Jackson's and of the American Steam Safe Company, and others, upon which note the loan of $4500 had been made by the bank; that this note became due in February, 1875, was unpaid and was protested for non-payment; that shortly after, the bank received from Jackson, in payment of the past-due time note, a new note, (the old note being retained by the bank,) with Jackson's name alone on it, for the sum of $4500 on demand made by Jackson, payable to the bank, and, together therewith, certain collateral security, the demand note, with the collateral, being received as a substitute for the old security; that the collateral consisted of three mortgage notes, together with the assignments of the mortgages, one of which notes and assignments was a note, a copy of which is annexed to the declaration, and an assignment of the mortgage of the plaintiff to Jackson; that the assignment of the mortgage was not made upon the original mortgage deed, but was a separate instrument, and was from Jackson to the defendant by name "as trustee," but the nature of the trust was not set forth in the instrument; that this assignment was executed on February 23, 1875, and recorded at the Registry of Deeds in Middlesex, Southern District, on February 23, 1875, and in the Suffolk Registry of Deeds, on March 10, 1875; and that, at the time that these notes and assignments were received by the bank, it was agreed between the bank and Jackson, that, in case the bank should receive upon the collateral more than sufficient to satisfy the $4500 demand note, the balance should be retained and credited towards satisfying whatever other indebtedness there might remain from Jackson to the bank.

It also appeared that the bank realized upon the whole of the collateral security, and obtained therefrom, including the $2053

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hereafter mentioned, paid by the plaintiff, more than enough to pay the $4500 demand note, with interest, and that the balance was duly credited towards satisfying the remaining indebtedness of Jackson; that Jackson was still a large debtor to the bank; and that, in case the bank should repay the $2053 paid by the plaintiff, the amount realized from the whole of the collateral would not be enough to satisfy and pay the $4500 demand note. This evidence was objected to as immaterial; but by agreement of counsel it was admitted *de bene*, and the judge reserved the matters of law arising thereon for the determination of this court. It was not admitted as bearing upon any of the questions submitted to the jury.

It also appeared, and was uncontested, that a petition in bankruptcy was filed against Jackson on May 28, 1875, and that he was duly adjudicated a bankrupt thereon.

The plaintiff proved that prior to February, 1875, and on March 18, 1873, Jackson made an assignment of the plaintiff's mortgage to the Franklin Insurance Company, and therewith a note, a copy of which is annexed to the declaration; that this assignment was not upon the original mortgage deed, but was a separate instrument, and that said assignment was not recorded until April 23, 1875; that, in the spring of 1875, hearing that Jackson had committed forgeries, the plaintiff desired to know what had become of his mortgage note; that he thereupon went to the registry of deeds at Cambridge, and got the register to look at the records, and was told by him that the mortgage had been assigned to William H. Goodwin; and he testified that nothing was said to him by the register about the word "trustee;" that he thereupon called upon the defendant at the bank, and had several interviews at the bank with him, which resulted on July 8, 1875, which was more than seven months before his note became due, in his paying to Goodwin the sum of $2053, being the amount of his mortgage note, and the interest due thereon and unpaid; that the paper purporting to be his mortgage note, being the one received from Jackson by the bank, was thereupon surrendered up to him, and that thereupon a friend who was with him, and in his presence and in the presence of the president and cashier of the bank, scratched with pen and ink the name "Thomas J. Welch" signed to the note

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that he directly went with the defendant to the registry of deeds, where the defendant, by a deed as trustee, released to him the mortgage made to Jackson, and that the release was thereupon immediately recorded at the said registry; that he thereafter, and on the same day, in conversation with friends and at their suggestion, tore the name of "Thomas J. Welch" off from the note, and destroyed that portion of the paper upon which it was written; that about July 26, 1875, he was led to suspect that the Franklin Insurance Company held a note purporting to be his mortgage note, and an assignment of the mortgage; that he called at the office of the company, and was there shown a note passed by Jackson to that company, which he then and there recognized to be the genuine mortgage note, and was also shown an assignment of the mortgage; that he never made but one note in his life; that he immediately consulted counsel, who, on July 28, 1875, gave to the defendant the notice, a copy of which is printed in the margin;* that, at the time he paid the $2053, he supposed and understood the note he then took up to be his genuine note, and always so supposed until he saw the note held by the Franklin Insurance Company; that the defendant never notified him that he was acting in the transaction other than personally, and that he did not know that it was a bank transaction; and that, after his first call upon the defendant, he received two letters, which he had since lost, requesting him to call again; that he could not swear certainly, but was very positive that these letters were signed in the defendant's name, and that there was nothing contained therein indicative of the matter being an affair of the bank. A witness called by the plaintiff, who came with him to the bank when the money was paid, testified that it was paid into the defendant's hands.

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* "Boston, July 28, 1875.

"Wm. H. Goodwin, Esq.

"Dear Sir: We are instructed by Mr. Thomas J. Welch to inform you that he finds his signature on the note for $2000, dated March 12, 1873, and paid to you July 8, to have been forged, and that the genuine mortgage note is held by the Franklin Insurance Company. Accordingly he requests you to repay the amount of his payment, viz. $2053.

"Respectfully yours,

"Morse, Stone & Greenough."

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The defendant introduced evidence that the $2053 was paid by the plaintiff into the hands of the cashier of the bank, and not into his hands; that the defendant never wrote to the plaintiff, but that the two letters received by the plaintiff were written upon paper upon the top of which was printed "Eliot National Bank. W. H. Goodwin, president; R. B. Conant, cashier;" and that both letters were written by the cashier, signed by him in his name, with the word "cashier" added, and that they referred to the matter as an affair of the bank, and stated that the bank held the assignment. The defendant proved that the money paid by the plaintiff was immediately credited to Jackson's account on the books of the bank, and was immediately placed with the other funds of the bank; that the note paid by the plaintiff was always kept by the bank together with its other securities, and was in charge of the cashier; that when the plaintiff paid the money, the defendant had no knowledge or suspicion of this note being a forgery, and no knowledge or suspicion of the existence of another note or of another assignment of the mortgage, and never had any knowledge or suspicion of either of these things. The defendant also testified that he did not recollect distinctly, but thought that at one of the interviews with the plaintiff, before the money was paid him, he exhibited to him the assignment from Jackson to himself as "trustee," which, however, the plaintiff denied, and said that he did not suppose that he had personally anything to do with the matter, but considered it a bank transaction, and that in all that he did he was acting in his capacity as president of the bank; that neither of the two letters received by the plaintiff mentioned the fact that the bank held the assignment, and that his object in the beginning in having the plaintiff call was to pay the interest due on the note.

The plaintiff introduced evidence tending to show that the note paid by him, and purporting to be witnessed by a clerk of Jackson, was a forgery, and that it was forged by Jackson; and that the note held by the Franklin Insurance Company was a genuine note. There was no other evidence in the case which was material. At the conclusion of the evidence, the defendant asked the judge to rule that the plaintiff could not maintain this action. The defendant contended that the action, if maintain

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able against anybody, should have been brought against the Eliot National Bank; that the action, if otherwise maintainable against the defendant, could not be maintained merely on proof of the note paid by the plaintiff being a forgery, and on proof of the notice of July 28, 1875, and on proof that he gave that notice within a day after going to the Franklin Insurance Company's office; that, as it appeared that the transaction of the bank with Jackson was *bonâ fide*, Jackson had thus parted with a title good as to the Franklin Insurance Company and the plaintiff, and that thus the bank was damaged by the release to the plaintiff of this mortgage; and that the notice of July 28, 1875, was not seasonable.

The judge declined so to rule, but stated that all the questions of law arising in the case should be reported to this court, and fully instructed the jury that if the plaintiff proved the facts stated in his declaration, he was entitled to recover; that the first question was whether the note was a forged note; that if the jury found it to be a forged note, the plaintiff was entitled to recover, provided that he was not informed of the forgery of the note until the day or day before he went to counsel, and that in such case the notice of July 28, 1875, would be seasonable notice, and provided that the defendant did not disclose to him the fact that he was not acting as principal in the transaction, and the plaintiff did not know at the time of the payment of the money to the defendant that the defendant was acting for the bank.

The jury returned a verdict for the plaintiff for $2053; and the judge reported the case for the determination of this court.

If the court should find upon this report that the action was maintainable, if at all, only against the bank, or that the notice was not seasonable so as to entitle the plaintiff to recover, or that the plaintiff could not, under the circumstances herein stated, maintain his action on proof of the note being a forgery and the note held by the Franklin Insurance Company genuine, and proof that the defendant did not disclose to the plaintiff the fact that he was acting as principal in the transaction, judgment was to be entered for the defendant; and in case the court should not so find in either particular as matter of law, but should find that the instructions to the jury were not conformable to the

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requirements of the case, the verdict was to be set aside and a new trial ordered.

R. R. Bishop & F. Goodwin, for the defendant.

R. M. Morse, Jr. & C. P. Greenough, for the plaintiff.

LORD, J. This case differs from that of *Carpenter* v. *Northborough National Bank*, *ante*, 66, in two particulars only. The payment was received by the defendant in this case as the agent of another party. The instructions of the presiding judge on that subject were correct. One who acts as the agent of an undisclosed principal may be treated as principal by the party with whom he deals.

The other particular, in which the case differs from that of *Carpenter* v. *Northborough National Bank*, is that the forgery, by means of which Jackson accomplished the fraud, was that of the name of the plaintiff himself; and the only question is, whether that fact of itself is an absolute bar to the right of the plaintiff to recover. We do not understand that any other question than this was presented to the mind of the judge who presided at the trial. If any other questions were presented, it is to be presumed that proper instructions were given in reference thereto, and that the jury were required to make the proper distinction and discrimination between the payment upon a note, the forged signature to which was that of the payer, and not that of another party to the contract.

It may well be held that a banking corporation, which issues notes as currency, upon such plates and with such securities as it deems sufficient, may be, from reasons of public policy, estopped to deny the genuineness of notes which it has redeemed as its own, while such considerations would have no bearing upon the question whether an individual should be permitted to show that a signature which he had treated as his own was, in fact, a forgery. Nor is it necessary in this case to go so far as to say, as was held by a majority of the court in *National Bank of North America* v. *Bangs*, 106 Mass. 441, that a bank may recover money paid upon the forged check of one of its depositors. In both those classes of cases, entirely different considerations may properly enter.

The question which we are called upon to decide is, whether, under any circumstances, a party may recover back money paid

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upon a security bearing a forged signature of himself, supposing it, at the time of payment, to be his own genuine signature. We can have no doubt that he may. This is entirely clear in case he was induced to make the payment by fraud or misrepresentation. Nor is it necessary that fraud or misrepresentation should exist. An innocent mistake, whether arising from natural or temporary infirmity or otherwise, made without fault upon his part, entitles him to the same relief. How far this right would be affected by neglect upon his part to give prompt notice of the mistake, or by any change affecting the situation or rights of the person to whom the payment is made, we are not called upon to consider. Here notice was given immediately upon discovering the forgery. Whatever securities were given up by the defendant, in consideration of the receipt of the forged note, had been given up before the payment was made. The discharge of the mortgage by Goodwin was the release of no substantial right. If Goodwin received any title to the mortgage or mortgaged premises by reason of the assignment to him, he received it in trust for another, and in no event for his own benefit. His discharge of it was therefore no injury in law to him. By the facts as they appear in the report, his discharge of the mortgage effected nothing except what by law or in equity he would be compelled to do. There is no reason, therefore, why the plaintiff should not recover; and there must be *Judgment on the verdict.*

CHARLES BREWER & others *vs.* AMERICAN INSURANCE COMPANY.

Suffolk. Nov. 20, 1876; June 5. — July 3, 1877. AMES, ENDICOTT & SOULE, JJ., absent.

A policy of marine insurance, insuring $3000 on freight valued at $15,000, contained the following clause: "In case of general average, this company is not liable to contribute on a sum greater than the amount herein insured." During the voyage, the vessel met with a general average loss which was adjusted at the port of destination, where the owner received his entire freight, namely, $20,564.34. The contributory value of the freight, after making the customary deductions, was $13,832.86, and the owner paid $1276 in behalf of the freight. *Held*, that the in-

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surer on freight was liable only for $623.79, being a sum bearing the same proportion to the whole amount contributed by the freight which the sum insured bore to the whole freight earned.

CONTRACT on a policy of insurance against perils of the seas, whereby the defendant insured the plaintiffs $5000 on the ship Coringa, valued at $25,000, and $3000 on her freight "on board or not on board," valued at $15,000, on a voyage therein described. The policy contained the following clause: "In case of any loss or misfortune, it shall be lawful for the insured, their factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said ship and freight or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute, in proportion as the sum insured is to the whole sum at risk." In the margin of the policy was the following clause: "In case of general average, this company is not liable to contribute on a sum greater than the amount herein insured."

The case was submitted to the Superior Court on an agreed statement of facts in substance as follows:

The ship, while insured under the policy, was injured by perils of the seas, and it was necessary for the preservation of the ship and cargo to put into the port of Honolulu, and there to unload the cargo and store the same while the ship was being repaired, and to load it again, and to incur other expenses in and about the same. By reason thereof the ship was enabled to and did complete her voyage to Hamburg, and there received the whole amount of freight, namely, $20,564.34. A general average adjustment was made in Hamburg, in which the contributory value of the cargo, after deducting freight and charges, appeared as $4572.23; that of the vessel, $13,535.07, and that of the freight, after making the customary deductions, as $13,832.86. In accordance with the adjustment, the plaintiffs, as owners of the ship, were obliged to pay and did pay the sum of $4184 in behalf of the vessel, and the sum of $4276 in behalf of the freight, as contributions to the general average loss.

The defendant owes the plaintiffs the sum of $836.80, its proportion of the ship's contribution to the general average loss. The plaintiffs contend that the amount of the loss to be paid by the defendant, as insurer of $3000 on the freight, is $855.20,

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being a sum bearing the same proportion to $4276, the whole amount contributed by the freight, which $3000, the sum insured by the defendant on the freight, bears to $15,000, the valuation of the freight in the policy. The defendant contends that the amount of loss to be paid by it is $623.79, being a sum bearing the same proportion to said $4276, the whole amount contributed by the freight, which said $3000, the sum insured by the defendant on the freight, bears to $20,564.34, the whole freight earned.

Judgment was to be entered for the plaintiffs for $1692, or for $1460.57, as the court should order, together with interest from August 17, 1874.

The Superior Court ordered judgment for the smaller sum; and the plaintiffs appealed to this court.

The case was argued at the bar in November 1876, and further argued in writing in June 1877.

H. W. Paine & W. W. Vaughan, for the plaintiffs. 1. It is admitted that the expenditures in this case were for the "defence, safeguard and recovery" of the ship and freight. The sum insured is also fixed; and the only question is, "What is the whole sum at risk?" In the case of freight, the sum at risk is the freight. This has been stated by the insured to be worth $15,000, and the insurer has accepted this valuation, and agreed to stand by it. This, then, is the sum at risk, for it is what the insurer risks by signing the policy. The defendant, therefore, as insurer of freight, is to pay a sum which bears the same proportion to the sum paid in behalf of the freight that $3000 bears to $15,000.

2. If compensation is to be recovered from the defendant under the implied undertaking to pay a general average loss, only two views are possible. Either the sum paid by the owner as general average loss is to be regarded as so much money which the owner has been compelled to pay to ransom from threatened destruction the property which is insured by the defendant, and, therefore, at the defendant's risk; and the defendant is to reimburse the owner for this outlay, because the defendant is the party really benefited by it. Or else this sum is to be adjusted upon the principles by which a partial loss is adjusted under a valued policy. If the implied liability of the defendant rests

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upon the former ground, then an underwriter who insures to the full value should be held liable to repay to the owner the whole sum which he has been compelled to pay out, for this sum has really been paid out for the benefit of the insurer, and not of the owner. The fully insured owner runs no risk of loss, for if his property arrives in safety he has his goods; if they are lost, he has his insurance money; if they are partially lost or damaged, he has his property partly in the form of money, and partly *in specie*. It is immaterial to him whether his goods arrive or not, while to the insurer it is all important that they should come to port in safety. Any outlay, then, made to secure this end, enures directly to the sole benefit of the insurer, and should be borne by him in full. *Strong* v. *New York Firemen Ins. Co.* 11 Johns. 323. If he is an insurer for less than the full value, the outlay enures to his benefit in the proportion that the sum insured by him bears to the full value, and in that proportion he should contribute to it. This would make the rule for contribution the same as that stated in words in the labor clause, and the same arguments would apply to show that the full value is the value which the parties have agreed in the policy to be the full value. If, however, this expenditure is to be contributed to by the defendant according to the principles upon which partial losses are settled under valued policies, the defendant's contribution must be none the less determined upon the basis of the valuation in the policy, and will considerably exceed that claimed by the plaintiffs. The valuation in the policy is equally binding on the parties in cases of total loss, of partial loss and of general average loss, and the method of computation adopted by the defendant cannot be correct, for it disregards entirely the valuation in the policy, and treats it as if it were an open policy. The true rule seems to be, that, although the valuation in the policy may, and in fact must, be disregarded, in ascertaining the quantum of injury suffered, yet that it is in all cases conclusive between insurer and insured in determining the quantum of payment to be made by the insured. *Lewis* v. *Rucker*, 2 Burr. 1167. *Peele* v. *Merchants Ins. Co.* 3 Mason, 27, 71.

In the case of a total loss under a valued policy, the valuation is universally admitted to be binding in determining the amount of payment. In actual total loss, no question arises as to the

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quantum of injury. But in cases involving constructive total loss, it may become necessary to ascertain the quantum of injury, that is, the ratio which the cost of repairing bears to the value of the vessel, in determining whether the insured has a right to abandon or not. But, even in cases where the actual value of the vessel has been taken in determining this question, the right to abandon having been once established, the amount of payment has been determined on the basis of the valuation in the policy. *Irving* v. *Manning*, 6 C. B. 391. *Peele* v. *Merchants Ins. Co. ubi supra.* In the case of partial loss, it is now settled that the same rule applies; that is, in determining the proportional loss of the property insured, whether it is one third or one tenth worse than if no loss had occurred, the actual values are to be taken without regard to the valuation in the policy; but, in determining what is the amount to be paid by the insurer for this loss, the valuation in the policy only is to be taken, and the actual values disregarded. *Fay* v. *Alliance Ins. Co.* 16 Gray, 455. *Lord* v. *Neptune Ins. Co.* 10 Gray, 109, 130. *M'Gaw* v. *Ocean Ins. Co.* 23 Pick. 405. *Lewis* v. *Rucker*, *ubi supra.* *Tunno* v. *Edwards*, 12 East, 488. *Goldsmid* v. *Gillies*, 4 Taunt. 803. *Forbes* v. *Aspinall*, 13 East, 323. Stevens on Average, (1st Am. ed.) 163–168. Stevens & Benecke on Average, 48. 1 Arnould on Ins. (3d Eng. ed.) 292, 293. 2 Phil. Ins. (5th ed.) § 1203. 3 Kent Com. (12th ed.) 274. The doctrine once propounded by some authorities, that in all cases of partial loss the policy was to be treated as if it were an open policy, seems to have arisen from a misapprehension of a remark made by Lord Mansfield in *Le Cras* v. *Hughes*, 3 Doug. 81, and to have been long since abandoned. In so far as *Clark* v. *United Ins. Co.* 7 Mass. 365, is a decision to this effect, it must be regarded as overruled by *Fay* v. *Alliance Ins. Co.* 16 Gray, 455, and other later cases. The same rule as to valuations should be applied in cases of general average loss as of particular average or partial loss; the contributing values being taken as the actual values. A general average loss is in its nature the same as a particular average loss. Brett, J., in *Harris* v. *Scaramanga*, L. R. 7 C. P 481, 496. If the case of *Clark* v. *United Ins. Co.* is decided upon the ground that the valuation in a policy must be disregarded in all cases except those of total loss, it was decided in

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accordance with a doctrine which has since been overthrown. If the case follows *Lewis* v. *Rucker*, it misapplies the rule there given in estimating the contribution to be paid by the insurer. In either view, it cannot be conclusive of the case at bar.

The sum stated to have been actually received by the plaintiffs as gross freight, cannot be used in determining the quantum of injury or percentage of loss suffered by the freight as a whole. It was the duty of the adjusters at Hamburg to ascertain this; and, in doing so, they had the right to appraise the freight at any value which seemed to them, in the exercise of their judgment, to be proper. They saw fit to appraise it at $13,832.86; and neither party can argue that this was, in fact, too small or too large, or not the value of the whole. We have no means of knowing on what principles they arrived at their valuation, nor have we the right to inquire. It is as conclusive as the finding of a jury. The sum actually received cannot be used in ascertaining the quantum of payment to be made by the insurer to the insured, *i. e.* in fixing the value of the freight to which the percentage of loss is to be applied, for the parties have expressly agreed that this value is $15,000 and not $20,564.34.

3. The clause in the margin of the policy has no bearing on the case, because, in no aspect of the case, is the defendant asked to contribute on a sum greater than that insured by it, namely, $3000. The clause guards against a claim which is never made.

C. A. Welch, for the defendant, cited *Clark* v. *United Ins. Co.* 7 Mass. 365; 2 Phil. Ins. § 1410; 2 Parsons Mar. Law, 429; 2 Arnould Ins. (3d Eng. ed.) 824; Dixon on Av. 438; Stevens & Benecke on Av. 13, 221; Lowndes on Av. (2d ed.) 298.

LORD, J. In this case it is agreed that the insured sustained a loss by the perils insured against, which was the subject of general average; and that a general average adjustment was made in Hamburg. To this loss, the vessel, the cargo, and freight must contribute according to their respective values. The insurance which is the subject of controversy here is insurance upon freight. The policy insures $3000 on her freight valued at $15,000. In the adjustment of the general average in Hamburg, the freight earned and received was found to be $20,564.34, and the real question between these parties is,

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whether the plaintiff shall be deemed to be an insurer or owner of the excess of the freight above the valued freight in the policy, and so contribute toward the loss to the extent of his interest, or whether, for the purposes of this case, the sum of $15,000 is to be deemed to be the true valuation of the whole freight, thereby rendering the defendant liable to contribution upon that basis.

In *Clark* v. *United Ins. Co.* 7 Mass. 365, this question was first considered in this Commonwealth. It happened in that case that the vessel insured was valued in the policy at $6000, and, as stated in the opinion, the cargo was valued at $2000, its true value when shipped, upon which insurance was effected to the amount of $1500 on the ship and $500 on the cargo. A loss occurred which was the subject of general average. The general average adjustment was made at Dublin, where the value of the ship was found to be $8000, and the true value of the cargo at that port was $5510; and the same question arose in that case as to the ship and the cargo, as in this case arises as to freight. The opinion in that case was delivered by Mr. Justice Sewall, and it is quite apparent that he understood that the result at which he arrived was in accordance with established usage in this Commonwealth. The increased value of the ship, he says, must have arisen either in consequence of an under-valuation at the home port, or "by means of some addition and repairs of an extraordinary nature made in the course of the voyage." The additional value of the cargo was that increased value which is expected as profits at the termination of the voyage. Such increased value, as expected profits, he says, it is not unusual to have insurance upon, "*eo nomine*, made at the same time, as upon an interest which may be distinctly valued and estimated." As to each of these increased values, he held that the assured would be his own underwriter.

This case has been referred to approvingly, and its authority has not been denied, in this Commonwealth; and, although different rules may have been applied by some other courts, so that perhaps this may not be deemed to be the universal rule of insurance in cases of this kind, we suppose it has been the accepted rule among underwriters and those insured within this Commonwealth. We are confirmed in this view by finding

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among the conditions upon which this policy is issued, as printed in the policy, this provision: "In case of general average this company is not liable to contribute on a sum greater than the amount herein insured." We can attach no other meaning to this provision than that the parties understood that, in case of general average, the contribution was to be made by the respective interests at the true value thereof, and that the sum insured was to contribute in the same proportion that that sum bore to the actual value, and that, as to the difference between the freight as valued in the policy, $15,000, and its real value, $20,564.34, the plaintiff is to be regarded as his own underwriter and to contribute on that sum. In any other view the provision would seem to be without meaning; and so the plaintiffs contend that it provides against a contingency which can never happen. Upon this construction of the contract, it would seem that, without regard to the general principles of law, the parties have themselves by their contract agreed upon the mode of contribution. It therefore becomes unnecessary to consider whether, without any stipulation by the parties, the same result would be reached by the general principles of law applicable to the subject within this Commonwealth. The judgment of the Superior Court for the smaller sum must, therefore, be

Affirmed.

JULIA MARTIN *vs.* BRIDGET TOBIN.

Suffolk. March 8. — July 3, 1877. ENDICOTT & SOULE, JJ., absent.

A bequest in a will of all the testator's interest in a certain described estate operates as an assignment of his interest as lessee in the estate.

A lessee of land became the owner of an undivided portion of it, and executed a mortgage of this undivided portion, reciting that a part of the premises was subject to a lease and that the leased premises were included in the description and in the mortgage. The mortgagee afterwards entered to foreclose. *Held*, that, even if the lease passed by the mortgage, the lessee had the right of possession against all persons except the mortgagee, until the expiration of three years from the entry, and could maintain an action, for a trespass within that time, against a third person.

In an action of trespass by the assignee of a lease of land, evidence that his assignor wrongfully used money in his possession as guardian in the purchase of the lease is irrelevant and inadmissible.

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In an action of trespass, the question whether a lease, under which the plaintiff claims to be in possession, has been terminated, does not so involve the title to real estate, that under the Gen. Sts. c. 120, § 13, the case may be removed at the request of either party from a municipal court to the Superior Court.

TORT for breaking and entering the plaintiff's close. Writ dated August 14, 1874. At the trial in the Superior Court, on appeal, the jury, by agreement of parties, returned a verdict for the plaintiff, and *Pitman*, J., reported the case for the determination of this court. The facts appear in the opinion.

L. M. Child & T. E. Barry, for the plaintiff.

G. L. Ruffin, (*G. W. Searle* with him,) for the defendant.

MORTON, J. Robert Tobin, being the owner of the premises in question, on March 9, 1860, leased them to Timothy Connolly for a term of twenty years. On October 27, 1866, Connolly assigned this lease to John Tobin. In 1870, John Tobin died, and by his will devised and bequeathed to the plaintiff "any and all interest which I now have in and to any and all real estate in said Boston, and especially to my interest in the estate numbered one Norwich Street in said Boston," being the premises in question. This bequest included the testator's leasehold estate, and operated as an assignment of the lease to the plaintiff, if it was then in force. There is nothing in the case to show that this lease has ever been extinguished.

It appears that, after the lease was assigned to him, John Tobin became the owner in fee of an undivided half of the estate of which the leased premises were a part; but it is clear that this did not extinguish the lease. There was no union of the greater and the less estate, in the same person, and in the same right, which is necessary to create a merger. *Johnson* v. *Johnson*, 7 Allen, 196.

The defendant, who is the widow of John Tobin, put in evidence a mortgage from John Tobin to one Jeremiah Donnavan, dated October 27, 1866, of one undivided half of said estate "in common with my six minor children who own the other moiety, a part of said premises being subject to a lease made by said Robert Tobin to Timothy Connolly, which said lease has been assigned to me for the unexpired term, and said leased premises are included in said description and in this mortgage;" and also evidence that the assignee of this mortgage, on Octo-

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ber 15, 1872, made an open and peaceable entry, in the presence of two witnesses, upon the premises described in the mortgage, for the purpose of foreclosure, and duly recorded a certificate thereof, under the statute. She now contends that the effect of this mortgage and entry to foreclose was to defeat the plaintiff's right to the possession of the leased premises.

This was a mortgage of real estate, and, we think, did not include the term of years, which is a chattel, and did not, therefore, operate as an assignment of the lease. But, if it could be construed to operate as such assignment, it was an assignment in mortgage; and until the mortgagee took actual possession, or until a completed foreclosure, Tobin and the plaintiff, his legatee, had the right of possession against all other persons.

It follows therefore that up to the date of her writ, which was less than three years after the formal entry to foreclose, the plaintiff as lessee had the right of possession of the premises in question, and can maintain this action against the defendant for the invasion of this right.

The evidence offered by the defendant that John Tobin misused the money of his minor children held by him as their guardian, and applied it to the purchase of the assignment of the lease to him, was irrelevant and inadmissible.

The defendant also contends that the Superior Court had no jurisdiction of this case. The suit was commenced in the Municipal Court of Boston, and at the trial there the defendant moved that the case be removed to the Superior Court, on the ground that the title to real estate was in issue, but the court denied the motion. The defendant's argument is that the court erred in denying this motion, that it had no jurisdiction to try the case, and therefore that the Superior Court had no jurisdiction over the case. It is true that the Municipal Court of Boston has not jurisdiction to try suits in which the title to real estate is concerned. The statute, which applies to that court as well as to justices of the peace, provides that "when it appears, by the pleadings or otherwise, in an action pending before a justice of the peace, that the title to real estate is concerned or brought in question, the fact, if it does not appear by the pleadings, shall be stated on the record, and the case shall at the request of either party be removed to the Superior Court,

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to be there tried and determined in like manner as if it had been originally commenced in that court." Gen. Sts. *c.* 120, § 13.

The report before us does not show that it appeared, by the pleadings or otherwise, in the Municipal Court, that the title to real estate was concerned. It fails therefore to show that that court had not jurisdiction to try the case. On the contrary, it appears by the report that the title to real estate, within the meaning of the statute, is not brought in question in this case. The only question is as to the plaintiff's right of possession under a lease for a term of years. Such a leasehold interest is personal estate. It is true the defendant claims to be a tenant in common of the fee, but her title is not disputed by the plaintiff, who claims under a lease executed before such title accrued. The only question is whether such lease had been terminated. A question of title to real estate is no more involved than in any case where a lessee sues for a trespass and is required to prove his lease. *Judgment on the verdict for the plaintiff.*

GERARD C. TOBEY *vs.* SETH WOOD & others.

Suffolk. March 9. — July 3, 1877. ENDICOTT & SOULE, JJ., absent.

A firm, of which an infant was a member, gave certain checks in payment for goods, and the infant supposed, when he became of age and until after the firm's dissolution, that the checks, which were duly protested for non-payment, were paid. At the dissolution, which was seven weeks after the infant became of age, during which time he drew money from the firm for his personal use, some of the goods were unsold, and his partners agreed with him to assume and pay all the firm's debts. *Held*, that the above facts would not justify a finding that there was a ratification by the infant, after he came of age, of his promise to pay the checks.

MORTON, J. This is an action of contract upon two checks, dated respectively December 2, 1872, and January 3, 1873, signed by Seth Wood & Co., and duly presented for payment, and protested for non-payment.

The defendant Humes, the only one of the signers who defends the action, was a member of the firm of Seth Wood & Co., and, when the checks were drawn, was an infant. His promise to pay the checks, therefore, was a voidable contract,

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and the burden of proof is upon the plaintiff to show that Humes, after he became of age, affirmed and ratified the contract. 2 Greenl. Ev. § 367, and cases cited. *Reed* v. *Batchelder*, 1 Met. 559. Such ratification may be shown, either by proof of an express promise to pay the debt, made by the infant after he became of age, (which is not claimed in this case,) or by proof of such acts of the infant, after he became of age, as fairly and justly lead to the inference that he intended to ratify the contract and pay the debt. *Boody* v. *McKenney*, 23 Maine, 517. *Proctor* v. *Sears*, 4 Allen, 95. *Thompson* v. *Lay*, 4 Pick. 48. *Peirce* v. *Tobey*, 5 Met. 168. *Dublin & Wicklow Railway* v. *Black*, 8 Exch. 181; *S. C.* 16 Eng. L. & Eq. 558, and note.

The plaintiff contends that the facts in this case justify the finding that the defendant Humes intended to and did ratify his promise to pay these checks. These facts are, that a portion of the goods which formed the consideration of the checks remained unsold up to the time of the dissolution of the firm, which was seven weeks after Humes became of age; that during said seven weeks he drew money for his personal use, from time to time, from the firm; and that, at the dissolution, his partners, the other defendants, agreed with him that they would assume and pay all the debts of the firm. It is also agreed that, at the time Humes became of age, and until after the dissolution, he supposed that these checks were paid.

It has often been held that, if an infant purchases property, and, after he becomes of age, retains specifically the property, and uses or disposes of it, it may be an affirmance of the contract by which he acquired it, and deprive him of the right to avoid. *Chandler* v. *Simmons*, 97 Mass. 508, and cases cited. This is upon the ground that he can honestly retain the goods only upon the assumption that the contract by which he acquired them was valid, and therefore his retention and use of them, if unexplained, justly leads to the inference of a promise or undertaking to pay for them, after his incapacity to make contracts is removed. *Todd* v. *Clapp*, 118 Mass. 495.

But this rule cannot apply in the present case, because it is not shown that Humes knew that any of the goods, which were the consideration of the checks, remained undisposed of at the time he became of age, and it is shown that he supposed that

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the checks had been paid. Under these circumstances, there is no foundation for an inference of a promise by him to pay the checks. *Smith* v. *Kelley*, 13 Met. 309.

The facts that Humes remained in the firm for seven weeks after he became of age, drawing money from time to time for his personal use, and that when he retired he took an agreement from his partners that they would pay all the debts of the firm, are relied upon by the plaintiff as showing an affirmance of the checks. But we are of opinion that these facts do not afford sufficient proof of such affirmance. In this connection, it must be borne in mind that Humes supposed these checks to have been paid. In the absence of an express promise to pay, an affirmance can only be shown by unequivocal acts of the defendant, after he became capable of contracting, which show his intention to pay the debt. How far these acts of Humes might tend to show an intention on his part to ratify such debts of the firm as were within his knowledge, need not be considered. It would be forced and unreasonable to infer from them an intention and promise to pay a debt which he supposed had already been paid. *Crabtree* v. *May*, 1 B. Mon. 289. *Minock* v. *Shortridge*, 21 Mich. 304. *Dana* v. *Stearns*, 3 Cush. 372.

It is argued that the taking an agreement of indemnity from his partners implies that he was liable for the debts of the firm, and is therefore evidence of a promise to ratify and pay such debts. This is not necessarily so. The contract of indemnity may have been necessary for his protection against debts of the firm contracted after he became of age. But if this act is to be regarded as evidence that he supposed himself liable for all the debts of the firm, it is not of itself sufficient proof of a ratification. The act relied on as a ratification of a promise made during infancy must amount to, or be sufficient evidence of, a promise or undertaking to pay the debt. *Smith* v. *Kelley*, 13 Met. 309.

Perhaps if an infant member of a firm should, after he became of age, buy out his partners, take the property of the firm, and agree to pay all the debts of the firm, this might amount to a ratification of his promise to pay all the firm debts, whether known or unknown to him. It would be a clear expression of his intention and undertaking, after he became competent to

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bind himself, to affirm and pay such debts. But taking from his partners a promise that they will pay the debts does not imply an intention on his part to pay them. It implies that he desires and expects that they will pay the debts, and is as consistent with an intention on his part to avail himself of the defence of infancy, as of the intention to waive that privilege. Upon the whole case, we are of opinion that the facts do not justify a finding that the defendant Humes, after he became of age, ratified or promised to pay the checks in suit.

Judgment for the defendant Humes.

T. Weston, Jr., for the plaintiff.

J. Fox, for the defendant Humes.

BARTHOLOMEW CUSICK *vs.* INHABITANTS OF BROOKLINE.

Suffolk. March 12. — July 3, 1877. ENDICOTT & SOULE, JJ., absent.

Under the St. of 1866, c. 172, providing state aid for certain persons, and, in § 11, that towns and cities may raise and apply money for such purpose, and that "all persons entitled to aid" "who do not apply for the same within three months from the passage hereof, shall not receive said aid prior to the date of their application," a vote of a town to pay such a person "back state aid," upon an application filed after the expiration of the three months, is illegal and void.

CONTRACT to recover $350, the amount of an appropriation voted by the defendant at a town meeting on April 12, 1875, under an appropriate article in the warrant, "for the purpose of paying Bartholomew Cusick back state aid."

Trial in the Superior Court, before *Gardner*, J., who directed a verdict for the defendant, and reported the case for the consideration of this court. So much of the report as is necessary to the understanding of the point decided was as follows:

The plaintiff introduced evidence tending to show that he enlisted into the military service of the United States on November 3, 1861, (at which time he resided in Brookline,) as a member of Company A, Thirty-second Regiment Massachusetts Volunteers; that he was duly mustered into service as a member of said company, and served therein until February 9, 1863, when

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he was honorably discharged for disability; that he resided in this state; that he was, and had been ever since said service, partially disabled by sickness contracted therein, for which he was in receipt of a pension from the United States; that he was claimed by the town of Brookline as part of her quota under a call of the President for volunteers, and allowed as such by the state; and that he was credited by the United States to this state as part of said quota under said call.

There was evidence that he was paid state aid by the town of Brookline in 1861, but to what amount did not appear; that he was paid $156 as state aid by the town in 1862, of which $144 was reimbursed by the state, and that he was paid $15 in 1863, which also was reimbursed; that, after the payments in 1863, he made no application for state aid until January 18, 1875, when he did make application to the selectmen, which application was duly transmitted by them to the state authorities, and was produced at the trial by the state auditor; and that, since the date of the application, he had received $2 a month as state aid. Except as aforesaid, he had received no state aid from any town or state.

A. E. Pillsbury, for the plaintiff.

M. Williams, Jr., for the defendant.

MORTON, J. The right of the plaintiff to receive state aid from the town of Brookline, and the legality of the vote of the town appropriating "the sum of $350 for the purpose of paying Bartholomew Cusick back state aid," depend upon the construction of the St. of 1866, *c.* 172.

This statute, by its terms, expired on January 1, 1871, but, by successive statutes, its operation was extended to January 1, 1880. Sts. 1870, *c.* 339; 1872, *c.* 324; 1874, *c.* 330. This statute therefore was in force when the vote was passed, and was the only statute, then in force, which authorized the town to raise and appropriate money for the purpose contemplated in the vote.

The statute provides that "the treasurers of cities and towns shall, under the direction of the city council or selectmen thereof, pay monthly the sum of six dollars, from and after the first day of January in the year eighteen hundred and sixty-six, to any person" who has the qualifications fixed by the subsequent pro-

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visions. The eleventh section provides that "any town or city may raise money by taxation or otherwise, and, if necessary, apply the same for the purposes set forth in this act; and all persons entitled to aid under the provisions of this act, who do not apply for the same within three months from the passage hereof, shall not receive said aid prior to the date of their application."

In the case at bar, it was shown at the trial that Cusick received aid from the town of Brookline in 1862 and 1863, and that, after the payments in 1863, "he made no application for state aid until January 18, 1875, when he did make application to the selectmen, which application was duly transmitted by them to the state authorities."

It thus appears that the plaintiff does not bring himself within the terms of the statute, as a person entitled to receive state aid from the town for any time prior to January 18, 1875. The vote of the town was to raise and appropriate money for the purpose of paying the plaintiff "back state aid." No one can doubt that by this was meant state aid for the time prior to his application in January, 1875. The plaintiff had no right to such aid, and the town had no authority to raise or appropriate money for the purpose of paying it. The vote to do so was a vote to pay to the plaintiff a mere gratuity, and was illegal and void.

These reasons are decisive against the plaintiff's right to maintain this action, and it is not necessary to discuss the other grounds of defence urged on behalf of the town.

Judgment on the verdict for the defendant

DANIEL E. PAGE *vs.* FREDERICK W. COLE.

Suffolk. March 14. — July 3, 1877. ENDICOTT & SOULE, JJ., absent.

If a defendant in an action of contract, who has been duly adjudged a bankrupt after verdict against him and before judgment, makes application to have the case continued to await the determination of the bankruptcy court upon the question of his discharge, the Superior Court cannot enter judgment, even as of a former day; and the fact that the defendant obtained a delay of the judgment by a frivolous motion for a new trial is immaterial.

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CONTRACT for breach of an agreement. Writ dated December 22, 1873. On the same day personal property of the defendant was attached, and, on the next day, the defendant gave a bond with sureties to dissolve the attachment.

After the former decision reported 120 Mass. 37, the case was tried in the Superior Court, without a jury, before *Brigham*, C. J., who on October 16, 1876, found for the plaintiff in the sum of $420.52. On the following day the defendant filed a motion to set aside the finding and for a new trial, based on the grounds that the finding was contrary to law, and that the finding was against the evidence and the weight of the evidence.

The judge ceased the trial of cases in Suffolk on October 14, and did not return to hear motions until November 6. On the latter day the plaintiff's counsel applied to the judge (the defendant's counsel not being present nor having been notified) to have a day assigned for argument of the motion for a new trial. The judge stated that he would, on the following morning, fix a time. On the morning of the 7th, the judge accordingly fixed Thursday the 9th, at four o'clock in the afternoon, as the time for such argument, the defendant's counsel not being present nor having been notified of or consulted about the proceedings of the 6th or 7th, and having no knowledge of them. The judge directed the plaintiff's counsel on the 7th to notify the defendant's counsel that the hearing would take place on the 9th, at four in the afternoon. The plaintiff's counsel did not notify the defendant's counsel of such hearing until an hour before the time appointed for the hearing. The defendant's counsel, upon being notified, went immediately to the judge, and in the presence of the plaintiff's counsel complained that he had not had sufficient and proper notice of the assignment, pleaded an imperative professional engagement, which was at the time occupying him, and asked for a postponement of the hearing. The plaintiff's counsel objected to this unless the defendant would agree that, if the motion was overruled, judgment should be entered as of November 6. This the defendant's counsel expressly refused to do. The plaintiff's counsel then stated that he contended that the motion for a new trial was frivolous and intended for delay, and that he had reason to believe the object of the defendant's counsel in asking the delay was to get time to

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file a petition in bankruptcy before the following afternoon, and thus defeat the plaintiff's right to recover upon the bond taken to dissolve the attachment. To this allegation of the plaintiff's counsel, the defendant's counsel made no response, neither admitting nor denying the truth thereof. The judge finally postponed the argument on the motion for new trial until the following day, at four o'clock in the afternoon. On the next day, before the hour appointed, the defendant filed his voluntary petition in bankruptcy in the United States District Court, and was duly adjudged a bankrupt, and, before the hour fixed for said hearing on the motion for a new trial, a suggestion of the defendant's bankruptcy was filed in the case, and the usual motion was made in open court for a continuance of the cause. The plaintiff's counsel resisted this motion, and asked for judgment as of November 6. The defendant's counsel contended that the court could not properly and legally enter a judgment. No decision was made upon this motion, but the hearing upon the motion for a new trial proceeded, and was argued by the respective counsel. The judge took these several matters under advisement, and on December 4, 1876, overruled the motion for a new trial, and ordered judgment for the plaintiff as of November 6. To this order of judgment and refusal to continue the case, the defendant alleged exceptions.

J. Fox, for the defendant.

D. C. Linscott, for the plaintiff.

MORTON, J. The bankrupt act provides that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed." U. S. Rev. Sts. § 5106

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The object of this provision is not only to protect the bankrupt, to prevent his being harassed by suits while the question of his discharge is pending, and to enable him to plead his discharge in bar of the debt, but also to enable the assignee to come in and defend the suit. *Ray* v. *Wight*, 119 Mass. 426, and cases cited. *National Bank of Clinton* v. *Taylor*, 120 Mass. 124.

In the case at bar, before judgment was entered, the defendant was duly adjudged a bankrupt, and on the same day filed in the suit a suggestion of his bankruptcy and made application to the court to have the case stayed to await the determination of the question of his discharge. After this application, the Superior Court had no power to proceed further in the suit. It had no more power to enter a judgment as of a former day, the effect of which would be to hold the sureties on the bond to dissolve the attachment, to render the bankrupt liable to his sureties for such sum as they might pay notwithstanding his discharge, and thus practically to prevent his discharge from operating upon this debt, than it had to enter a judgment as of the day on which the order was made. The court cannot take into consideration the fact that the defendant obtained delay by a frivolous motion for a new trial. The provision of the bankrupt act is peremptory that upon the application of the bankrupt the suit shall be stayed to await the determination of the court of bankruptcy on the question of his discharge.

The order of the Superior Court that judgment be entered as of a former day was therefore erroneous.

Exceptions sustained.

BENJAMIN F. NOURSE *vs.* JANE P. HENSHAW.

Suffolk. March 15.—July 3, 1877. ENDICOTT & SOULE, JJ., absent.

Where money is lent to a married woman, upon an agreement that it shall be applied to the use of her husband or his firm, she is not liable on a note given by her therefor prior to the St. of 1874, *c.* 184.

Evidence that a firm was composed of the husband of a married woman, to whom money was lent, and of the son-in-law of the lender; that she was in no need of money except to assist her husband, and that the lender had no inducement to lend it except to aid the firm, which was in financial difficulty; that, during the negotiation, the question whether she ought to "sacrifice" her property for her husband's

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or the firm's benefit was discussed; that the money was handed to her, and she instantly, without counting it, handed it to her husband, who gave it immediately to his partner; and that the latter at once deposited it to the credit of the firm; will justify a finding that the money was lent upon an agreement that she should apply it to the use of her husband or his firm

MORTON, J. This is an action upon a promissory note, signed by the defendant and her husband, given for money lent by the plaintiff, and which was secured by a mortgage of the real estate of the defendant. The mortgage was foreclosed and the estate sold, and the proceeds applied to the payment of the note. They were insufficient to pay the note in full, and the question in this case is whether the defendant is personally liable for the balance remaining unpaid.

The case was tried by the court without a jury, and the presiding justice found as facts: "1. That it was the purpose and intention of the plaintiff to make the loan upon the credit of the defendant and of her estate; 2. That it was the defendant's purpose and intention, before and when she borrowed the money, to apply it to the benefit of the firm of which her husband was a member; 3. That the plaintiff, when he made the loan, knew that such was her intention, and that such knowledge was one of the inducements which influenced him in the transaction." He also "ruled, as matter of law, that there was no evidence in the case which would justify a finding that the loan was made upon condition that the money should be applied in any particular way, or that would justify a finding that there was an agreement binding on the defendant to furnish it to her husband or to his firm." To this ruling the defendant excepted.

When a case is tried by the court, either party may file exceptions to the decisions and rulings of the court upon matters of law arising upon such trial, "in the same manner and with the same effect as upon trial by jury." Gen. Sts. *c.* 129, § 67.

If the presiding justice had found as a fact that there was no such condition or agreement, such finding might be conclusive upon the defendant, and not open to exception; but, having ruled as matter of law that there was no evidence which would justify such a finding, the defendant has the right of exception, and we must consider the question precisely as if the same ruling had been made in a jury trial.

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To avoid misapprehension, it is proper to observe that the note in suit is dated in 1872, so that the St. of 1874, *c.* 184, which enlarges the capacity of married women to make contracts, does not apply to the case, but it is governed by the Gen. Sts. *c.* 108.

It has been held, under the Gen. Sts., that a married woman is liable upon a note given by her for money borrowed, or for goods purchased by her, upon her credit and for her sole use. *Wilder* v. *Richie*, 117 Mass. 382. *Allen* v. *Fuller*, 118 Mass. 402. This is upon the ground that, as the money or the goods became her separate property, her promise to pay for them is a contract in reference to her separate property.

But it has also been held that a note or other promise of a married woman, given for the accommodation of, or as surety for, her husband or any third person, cannot be enforced against her. *Willard* v. *Eastham*, 15 Gray, 328. *Athol Machine Co.* v. *Fuller*, 107 Mass. 437. *Heburn* v. *Warner*, 112 Mass. 271. The distinction between the two classes of cases is, that in one the money or property, in reference to which her promise is made, becomes her separate property, held to her sole use and under her sole control, while in the other it does not, by the contract into which she enters, become her separate property. And, in *Wilder* v. *Richie*, it was held that it was immaterial that the lender of the money had reason to believe that the married woman intended to devote it to the benefit of her husband, as it appeared that she received the money to her sole use, with the right to apply it as she saw fit, and the lender had no control over her disposition of it.

In the case at bar, the plaintiff lent the money upon the credit of the defendant and of her estate. At the time she borrowed it, she intended to apply it to the use of her husband or of his firm, and this was known to the plaintiff, and was one of the inducements which influenced him to make the loan. Notwithstanding this, he would be entitled to recover if, by the contract, the money went to her sole use and became her separate property, subject to her control. But if it was one of the terms or conditions of the contract that she should apply the money to the use of her husband's firm, the result would be different. In such case the transaction was, in substance, nothing more than the taking the note of the wife as security for money lent to her

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husband's firm. The money never became hers; she could not rightfully apply it as she saw fit, and had no control over its disposition. The placing the money in her hands was a mere form, if she was required by the contract to hand it over to her husband, and the transaction was the same in substance and effect as if the plaintiff had lent the money directly to the husband, and her promise to pay was not a contract, in reference to her separate property, which is binding upon her personally.

It thus appears that the question, whether the loan was made upon a condition or agreement that she should apply the money to the use of her husband or his firm, was a vital one. We must consider, therefore, whether there was any evidence which, in a jury trial, should be submitted to the jury upon the question whether there was such a condition or agreement.

It is true that there was no express, formal agreement that she should apply this money for the use of the firm; but it seems to us that the relations of the parties, the character of the transaction, and all the circumstances which surrounded it, would justify the inference that the real understanding of the parties was that the plaintiff should advance money to relieve the firm in its difficulties, and that the defendant should give her note and mortgage therefor. The firm was composed of the husband of the defendant and his brother, who was a son in law of the plaintiff. The defendant had no need of money except to assist her husband; the plaintiff had no motive or inducement to lend the money except to aid the firm, which was in financial difficulty. It is entirely clear that the sole object of both parties was to aid the firm. During the negotiations, they discussed the question whether the defendant ought to "make this sacrifice," meaning the sacrifice of her property for the benefit of her husband or his firm.

The acts of the parties, when they met at an attorney's office to complete the transaction, tend to show that the loan was made upon the agreement that it should be applied to the benefit of the firm. The defendant signed the mortgage and note, the money was handed to her, and she instantly, without counting it, handed it to her husband, who handed it to his partner in the entry, and the latter at once deposited it to the credit of the firm. Manifestly all the parties interested understood that the

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money was to be applied immediately to the use of the firm. It is not an unfair inference, from all this evidence, that there was an agreement between the plaintiff and defendant that the money should be thus applied. It is not necessary to prove an express agreement to this effect; it is enough if there was a mutual understanding that the loan was upon the condition that it was to be applied to the use of the firm.

If the defendant had taken the money and insisted upon using it for other purposes, the argument would have been very strong in favor of the plaintiff, that she had in so doing violated the implied agreement between them. It is not our province to decide, as matter of law, whether this evidence proves such an agreement; this is a question of fact; but we are of opinion that, in a trial before a jury, the evidence should be submitted to the jury, leaving to them to draw such inferences from it as they should think ought to be drawn.

It follows that the ruling of the court, that, as matter of law, the evidence would not justify a finding of an agreement or condition that the money advanced by the plaintiff should be applied to the use of the firm, was erroneous.

Exceptions sustained.

C. A. Welch, for the defendant.

E. F. Hodges, for the plaintiff.

JAMES FOSTER & another *vs.* JOSEPH C. WIGHTMAN & another.

Suffolk. March 20. — July 3, 1877. LORD & SOULE, JJ., absent.

The grantee of a mortgagor of land cannot, because of fraud practised by the mortgagee upon the mortgagor in obtaining the mortgage, maintain a bill in equity against an assignee of the mortgagee to restrain a sale of the mortgaged premises under a power in the mortgage, without paying the entire debt secured by the mortgage, although the mortgage was assigned to the defendant as security for a less amount.

BILL IN EQUITY by James Foster and Mary Hersey against Joseph C. Wightman and William I. Goodrich to restrain the sale of a parcel of land under a power contained in a mortgage

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from Hersey to Wightman, and assigned by him to Goodrich. The bill alleged in substance that Hersey, being the owner of the land, with her husband, made the mortgage to Wightman to secure the payment of a certain note made by them; that Wightman obtained the mortgage and note by fraud; that Wightman assigned the mortgage and note to Goodrich to secure certain indebtedness; that Hersey had conveyed all her interest in the premises to Foster; that Goodrich took possession of the land for the purpose of foreclosure, and had advertised it for sale; and prayed for an injunction, and that the plaintiffs might redeem on paying what was justly due to Goodrich.

It was agreed that Wightman obtained the note and mortgage by fraud, and that the bill be dismissed, without prejudice, as to him; that Goodrich took the assignment without notice of the fraud; that the debt due from Wightman to Goodrich was less than the amount of the mortgage, and that, if the mortgage was valid in his hands, for the full amount of the note, the plaintiffs did not care to redeem. Hearing upon the pleadings and proofs, before *Devens*, J., who ordered that the bill be dismissed with costs. The plaintiffs appealed.

F. A. Brooks, for the plaintiffs.

J. Cutler, for the defendant Goodrich.

MORTON, J. The plaintiffs having discontinued against the defendant Wightman, the case stands as if Foster had brought the bill against Goodrich alone to restrain him from foreclosing his mortgage by a sale under the power therein contained. The principles which control it are the same as if Goodrich had brought a writ of entry to foreclose his mortgage. This being so, the case is governed by *Fairfield* v. *McArthur*, 15 Gray, 526, in which it was held that a grantee of a mortgagor could not set up, in defence of a writ of entry to foreclose the mortgage, the fraud of the mortgagee, though the plaintiff, who was assignee of the mortgagee, took it with notice of the fraud. The deed of Mary Hersey to Foster did not pass any right of action which the mortgagors may have had against Wightman for deceit or fraud in procuring the mortgage. Such fraud being proved, they might elect to avoid the mortgage; but they may now bring an action against Wightman to recover damages for such deceit or fraud.

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It follows that in this suit the plaintiff Foster can redeem only by paying the full amount due on the mortgage note. As he admits that he is unwilling to redeem by paying the note, the bill must be dismissed. *Decree affirmed.*

GEORGE T. BIGELOW & another, executors, *vs.* EDMUND GILLOTT & others.

Suffolk. March 21. — July 3, 1877. LORD & SOULE, JJ., absent.

An erasure by a testator of certain clauses in his will, with the intention of revoking them only, is a valid revocation of such clauses, but not of the whole will; and the property thereby covered, in the absence of a contrary intention, passes under a general residuary clause in the will.

APPEAL from a decree of the Probate Court for the county of Suffolk, allowing a certain instrument, with the exception of the "sixth" and "thirteenth" clauses thereof, as the last will and testament of Thomas Liversidge, deceased. The will of the testator contained the following clauses:

"Sixth. I give to my executors the sum of six thousand pounds sterling, in trust, to be used and appropriated by them for the purpose of paying the debts which my father, Stephen Liversidge, owed in the year eighteen hundred and twenty-nine, said payment to be made to the legal representatives of the persons who were his creditors at the time: and it is my will and I hereby direct, that the principal only of said debts shall be paid, excluding interest; the sum of six thousand pounds being, in my opinion, sufficient for this purpose. If any portion of said six thousand pounds shall remain after payment of said debts, such remainder is to belong to the residue of my estate, and to be disposed of accordingly by said trustees."

"Thirteenth. I give and bequeath to John Shufeldt, of Marshfield in the County of Plymouth, the use and improvement of the estate and farm belonging to me in said Marshfield, during the term of his natural life, on the condition that said Shufeldt shall pay all taxes and cost of insurance appertaining to said estate,

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and shall continue to live thereon and occupy and cultivate the estate."

[The nineteenth clause gave his homestead estate to trustees to maintain a charitable institution.]

"Twentieth. I give, bequeath and devise all the rest, residue and remainder of my estate of every description, of which I shall die seised and possessed, to said Eleazer J. Bispham, Frederic A. Wellington and George Tyler Bigelow, absolutely and forever, in trust, nevertheless, to be appropriated, used and applied for the maintenance and support of the institution named and described in the last preceding clause of this will."

The appellants, the heirs at law of the testator, filed certain reasons of appeal, the following being the only one relied on in this court:

"That, it having clearly appeared by the evidence before the Probate Court that the obliterations in said paper writing were made subsequently to the execution thereof, as the last will and testament of the alleged testator, and that no reëxecution took place after said obliterations were made, the Probate Court, as it decreed the probate of the will, excepting the sixth and thirteenth clauses, should also have decreed that the portion of the estate originally disposed of under said sixth and thirteenth clauses, remained undisposed of by the testator at the time of his death, and passed to his heirs at law."

Hearing before *Colt*, J., who found that the will was duly executed on or about the time of its date, in the manner required by law, by Thomas Liversidge, as and for his last will and testament, and that he was at the time of executing the same of full age and of sound mind; that in the will, as presented for probate, ink lines appeared, drawn probably with a pen, through and across each and every word constituting the clauses of the will, numbered respectively "sixth" and "thirteenth," leaving the words, however, legible; that the lines were drawn across the words by Liversidge in his lifetime, after the execution of the will by him as aforesaid; and, on all the evidence bearing upon the intention of the testator in making these erasures, and upon the inspection of the original will, found, if competent so to find, that the erasures were made by the testator with the intention of revoking the sixth and thirteenth

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clauses of his will, but with no intention of revoking or defeating the other provisions of his will.

The question whether the evidence before him, (which was annexed to the report,) together with the original will, justified this finding, as well as the question, what effect those acts of the testator might have upon the will and the probate of it, were reserved for the consideration of the full court.

L. S. Dabney, for the executors.

H. A. Johnson, for the appellants. 1. By the Gen. Sts. *c.* 92, § 6, a will, excepting in special cases, must be executed in the presence of three or more witnesses. A will, and it would reasonably seem, a part of a will, may be revoked by obliteration without witnesses. The terms of the previous statutes, from which our present statute was taken, and the decisions under them, added to the fact that no reason anywhere appears, either in the commissioners' reports or the proceedings of the Legislature thereon, why any change was desirable, would seem to indicate the intention of the Legislature to have been merely to vary the language, but not the import of the statute in this respect. St. 29 Car. II. *c.* 3, § 6. St. 1783, *c.* 24, §§ 2, 6. Rev. Sts. *c.* 62, § 9. Gen. Sts. *c.* 92, § 11. The term "will," in this chapter, does not seem to be held as strictly limited in its signification, and may include in its meaning part of a will. Gen. Sts. *c.* 3, § 7, *cl.* 19. *Bayley* v. *Bailey*, 5 Cush. 245.

2. The statute cannot mean, by "revoked," that the will or bequest may not only be called back by obliteration, but that the testator may also thereby, and without witnesses, pass the estate to a new legatee, to whom he expressly did not give it before, and to whom it cannot be said in any way to pass by the act of God or by the law. *Larkins* v. *Larkins*, 3 B. & P. 16. *Quinn* v. *Quinn*, 1 Thompson & Cook, 437, 442. Cases where, in the language of Dewey, J., in *Thayer* v. *Wellington*, 9 Allen, 283, 295, "a general residuary bequest carries to the residuary legatee all void legacies, all lapsed legacies, all that is not disposed of to others, including in this last class what is not legally disposed of so as to pass to the person intended as the object of the testator's bounty," do not apply here. In all these the testator did his part of the work, *i. e.* executed his will in the presence of the witnesses the statute required, and the act of God or

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the law did the rest. It cannot be said that the law contemplates that bequests revoked by obliteration subsequently to the execution of the will shall pass to the residuary legatee, and that thus, when the testator executes his will, here is a portion of the estate which may eventually pass to the residuary legatee, and, when the obliteration takes place, does pass, as in case of a lapsed legacy. Such a view would too seriously conflict with the well grounded policy of the law requiring wills to be executed in the presence of witnesses; and, if such were the case, a testator, after executing his will, might obliterate all the bequests, excepting that to his residuary legatee, and thus give the bulk of his estate to the latter without witnesses, and under circumstances which the statutes as to execution of wills were expressly intended to guard against. The only application of the statutes to the present case, which will fully uphold the policy of the law that the heir at law shall not be disinherited unless by a will duly executed, and at the same time will allow proper effect to the provision for revocation by obliteration, is, that the testator could revoke the sixth and thirteenth clauses of his will with the intention of revoking them, but that thereby the estate originally covered by these clauses became undisposed-of estate, and as such passed to his heirs at law.

MORTON, J. The presiding justice who heard this case has found as facts, that the testator erased the sixth and thirteenth clauses of his will after its execution, and that such erasures were made with the intention of revoking the said clauses, but with no intention of revoking or defeating the other provisions of the will. These findings were clearly justified by the evidence. We need not consider the evidence in detail, as the appellants do not contend that the findings were erroneous, the only questions raised by them being as to the legal effect of such erasures.

The statute provides that "no will shall be revoked, unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction; or by some other will, codicil or writing, signed, attested and subscribed, in the manner provided for making a will." Gen. Sts. *c.* 92, § 11. This provision is a reënactment of the Rev. Sts. *c.* 62, § 9, with

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merely unimportant verbal changes. The Rev. Sts. made material changes in the law as to wills, doing away with the distinctions between wills affecting real, and wills affecting personal, property, and putting all upon the same footing. The St. of 1783, *c.* 24, § 2, permitted the revocation of a devise of land, "or any clause thereof," in the manner pointed out in the statute, which was the same manner now provided for the revocation of a will.

We see nothing to indicate that the Legislature, in the revision of 1836, intended to change the law in this respect and to limit the power of revocation to a revocation of the whole will. The power to revoke a will includes the power to revoke any part of it. If we were to hold that under this provision a testator could not revoke a part of a will by cancelling or obliterating it, we should be obliged by the same rule of construction to hold that he could not revoke a part by a codicil, which would be against the uniform practice in this Commonwealth, sanctioned by numerous decisions.

We are therefore of opinion that, in this case, the cancellation by the testator of the sixth and thirteenth clauses of his will, by drawing lines through them, with the intention of revoking them, was a legal revocation of those clauses.

The remaining question is as to the effect of this revocation upon the property affected by the revoked clauses. The appellants contend that the property devised and bequeathed therein is to be treated as intestate property, which goes to the heirs at law or distributees; and the executors and trustees contend that t passes to them under the residuary clause of the will.

It is a clearly settled rule of law that, in a will of personal property, a general residuary bequest carries to the residuary legatee all the personal property of the testator which is not otherwise disposed of by the will, including all lapsed legacies and all void legacies. And in this Commonwealth, since the passage of the Rev. Sts. in 1836, the same rule applies to wills of real estate. *Thayer* v. *Wellington*, 9 Allen, 283, and cases cited. It is true that if a special bequest in a will lapses or fails for any reason, the sum bequeathed will not pass to the residuary legatee if it appears from the will that it was the intention of the testator to exclude it from the residuary clause

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In *Thayer* v. *Wellington*, *ubi supra*, the court say: "We take the rule to be that a general residuary clause passes all the estate of the testator not otherwise disposed of, unless it is manifestly contradictory to the declared purpose of the testator, as found in other parts of the will. There must be a clear intention that in no event it shall pass to the residuary devisee."

In this case, there is nothing to indicate an intention on the part of the testator that the property covered by the revoked clauses should not go to the residuary devisees. The residuary clause is expressed in the broadest terms. "I give, bequeath and devise all the rest, residue and remainder of my estate of every description, of which I shall die seised and possessed." The intention of the testator is clear, to give all his property, not otherwise disposed of by the will, to the trustees named therein, for the support of the charity established by the nineteenth clause. He revoked the sixth and thirteenth clauses, and purposely and intelligently left the other provisions to stand as his will. The only fair inference is that he intended that the property covered by those clauses, and which by his revocation became undisposed of by the other clauses of the will, should fall within the residuary clause. We are of opinion that this case falls within the general rule, and that the property in question passes to the residuary devisees.

The argument of the appellants, that this view is in conflict with the provisions of law which require that a will disposing of property should be executed in the presence of three witnesses, is not sound. It is true that the act of revocation need not be done in the presence of witnesses; but such act does not dispose of the property. It is disposed of by the residuary clause, which is executed with all the formalities required in the execution of a testamentary disposition of property.

Decree of Probate Court affirmed.

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SETH E. PECKER & others *vs.* ELEANOR H. SILSBY.

Suffolk. March 29.—July 3, 1877. AMES & LORD, JJ., absent.

A mortgage of personal property from A. to B., expressed to be "subject to prior mortgages" to a certain amount to C., the amount and terms of which are known to B., conveys only the right to redeem the property from C.'s mortgage, and although recorded first, does not take precedence of C.'s mortgage.

REPLEVIN of chattels alleged to belong to Seth E. Pecker, Frank O. Dame and John H. Swasey. Writ dated June 23, 1875. At the trial in the Superior Court, before *Dewey*, J., the following facts appeared:

J. H. Silsby, on September 10, 1872, was owner of the property in question, and on the same day sold it to Flack & Finlay, and received back from them in part payment a mortgage to him to secure $8000, according to four notes for $2000 each, dated September 7, 1872. None of these notes were paid. This mortgage was duly recorded on September 10, 1872. Silsby died on August 2, 1874, a short time before the last of the above named notes fell due, and his wife, the defendant, was appointed executrix of his will on September 1, 1874.

On October 24 or 26, 1874, Flack & Finlay, then being the owners of all the personal property, subject to the mortgage aforesaid, gave a new mortgage, dated October 26, 1874, to the defendant, to secure the same debt as the old one, according to two notes of $4000 each, payable in six and twelve months respectively, and either on October 24 or 26, 1874, the defendant gave up to Flack & Finlay the old notes given to her husband and received the new notes and the mortgage to her.

On October 26, 1874, after the new mortgage and notes were delivered to the defendant, Flack & Finlay executed and delivered a bill of sale of the property to Pollard & Bliss, who took possession of it on October 27, 1874.

Pollard & Bliss, on October 27, 1874, in consideration of money advanced to them, executed two mortgages upon the property to the plaintiffs, one to Seth E. Pecker and Frank O. Dame, copartners under the style of Seth E. Pecker & Co., and one to John H. Swasey, both of which were delivered and recorded on the same day, and recited that they were subject

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to "prior mortgages to the amount in all of eight thousand dollars."

Pollard & Bliss, when negotiating with Flack & Finlay for the purchase of this property, understood that it was subject to a mortgage for $8000, belonging to the defendant, and, at the request of Pollard & Bliss, Flack & Finlay had procured the defendant either to extend the time of this mortgage or to renew the mortgage, so that the time of payment of the $8000 should be one half in six months and one half in twelve months.

It was known to the plaintiffs, at the time they took their mortgages, that there was a prior mortgage or prior mortgages on the property held by the defendant to secure $8000, but it was in dispute whether they knew this mortgage or one of these mortgages was a mortgage for $8000, payable one half in six months and one half in twelve months, and the question was submitted to the jury, who answered in the affirmative.

The defendant recorded her mortgage on October 31, 1874, after the mortgages to the plaintiffs were recorded, and at the same time discharged, but still retained possession of, the first mortgage to her husband.

After Pollard & Bliss took possession of the property, neither of the notes given to either of the plaintiffs or to the defendant was paid.

The defendant took possession of the property on June 22, 1875, and the plaintiffs sold it on June 23, 1875, under the power of sale contained in their mortgages, having previously taken possession under their mortgages on May 26, 1875, and bid off the property themselves, the defendant claiming title thereto at the time of the sale.

There was no evidence that either of the plaintiffs had ever examined the records of mortgages, or had ever seen either of the mortgages held by the defendant, but there were in fact no other prior mortgages upon the property except the two hereinbefore mentioned, both of which the defendant held, the first as executrix of the will of her late husband, and the second, which ran directly to herself, she being entitled thereto under the will.

The plaintiffs contended that, by reason of the fact that their mortgages were recorded before the mortgage to the defendant, dated October 26, 1874, they had priority of title to the prop-

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erty on the facts above stated. The defendant contended that on these facts she had the better title, and, being in possession, had the better right of possession.

By the consent of the parties, the judge reported the case, upon these facts and the finding of the jury, for the determination of this court.

If the plaintiffs could maintain this action, judgment was to be entered for them and one dollar damages; otherwise, judgment for the defendant and a return of the property, the damages to be assessed by an assessor.

R. M. Morse, Jr., for the plaintiffs.

W. A. Field, for the defendant.

MORTON, J. This case is governed by *Howard* v. *Chase*, 104 Mass. 249. The mortgage of Pollard & Bliss to the plaintiffs conveyed the personal property named therein "subject to prior mortgages to the amount in all of eight thousand dollars." The only existing prior mortgage was the one under which the defendant claims, and the amount and terms of this mortgage were known to Pollard & Bliss and to the plaintiffs. It was clearly the intention of Pollard & Bliss to sell, and of the plaintiffs to buy, the right of redeeming the defendant's mortgage, The plaintiffs took only what was conveyed, a right to redeem, and their mortgage, though recorded first, does not take precedence of the mortgage to the defendant.

Judgment for the defendant.

ELIZABETH W. PRATT, executrix, *vs.* TAUNTON COPPER MANUFACTURING COMPANY & another.

SAME *vs.* MACHINISTS' NATIONAL BANK & another.

Bristol. Jan. 3. — Sept. 5, 1877. COLT, AMES & SOULE, JJ., absent.

If a certificate of shares in the capital stock of a corporation is taken without the owner's knowledge, and, together with a forged power of attorney, is delivered to an auctioneer for sale, to whom the corporation issues a new certificate in the name of the auctioneer, who delivers it to an innocent purchaser for value, to whom, in turn, on its presentation, the corporation issues a new certificate, the owner is entitled, on a bill in equity against the corporation and purchaser, to a decree to com-

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pel the corporation to issue to him a certificate for his shares and to pay him the dividends thereon, but not to a decree against the purchaser; and, upon such a bill, the court cannot decide, unless by consent, whether the corporation is liable to the purchaser.

GRAY, C. J. The plaintiff was the owner of shares in each of the defendant corporations, and held certificates therefor, which were taken from her house without her knowledge, and, together with a forged power of attorney in her name to the corporation, delivered to W. N. Field & Company, brokers, for sale. Field & Company employed Hawes & Henshaw, stock auctioneers, to sell the shares by auction, and they sold them accordingly. Field & Company afterwards presented the certificate and power of attorney, in the one case, to the clerk of the corporation, duly empowered to make transfers, and, in the other case, to the cashier of the bank, and obtained from each a transfer of the stock and a new certificate, with a new number, in the name of Hawes & Henshaw, and delivered it to them; and Hawes & Henshaw delivered and assigned the new certificate to the purchaser in each case, who thereupon paid to them the sum for which he had bid off the stock, which was its fair market value, and they paid the same, less their commission, to Field & Company. The purchaser surrendered the new certificate to the corporation, and the corporation thereupon issued to him another certificate, which he now holds. Neither Hawes & Henshaw nor the purchaser had any knowledge, until after the transfer and issue of the certificate to him, that the plaintiff ever owned the shares; and the purchaser did not see any certificate of the stock until he paid for the one issued to him.

The plaintiff brings a bill in equity against each of the corporations and the purchaser of the shares therein, praying that the latter may be ordered to surrender his certificate to the corporation to be cancelled, and that the corporation may be ordered to issue to the plaintiff a new certificate for her shares, and to pay to her all dividends declared or to be declared thereon to the date of the decree, and for further relief.

The questions reserved for our determination in each case, by the justice before whom the hearing was had, are, 1st. Whether the plaintiff is entitled to the relief prayed for in the bill; 2d. Whether she is entitled to relief against the defendant corpora-

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tion alone; 3d. Whether she is entitled to relief against the individual defendant, and, if so, whether the corporation should be ordered to pay to him the amount paid by him for the stock in question, with interest from the date of payment, or any other amount.

It is quite clear that the plaintiff could not be deprived of her stock without consent or negligence on her part, and that, the power of attorney in her name being forged, she may maintain each of these bills to compel the corporation to issue a certificate to her for her shares, and to pay her the dividends thereon. *Ashby* v. *Blackwell*, 2 Eden, 299; *S. C.* Ambl. 503. *Sloman* v. *Bank of England*, 14 Sim. 475. *Midland Railway* v. *Taylor*, 8 H. L. Cas. 751. *Pollock* v. *National Bank*, 3 Selden, 274. *Sewall* v. *Boston Water Power Co.* 4 Allen, 277.

But the individual defendant was a purchaser in good faith for full consideration, without knowledge or notice of the plaintiff's title or of the forgery, and does not hold the certificates which she had. The immediate transfer to him was made by Hawes & Henshaw, who then held a new certificate of stock; and the corporation, upon his surrender of that certificate, issued to him another one. His rights against the corporation depend upon the effect of this certificate, and the plaintiff is clearly entitled to no decree against him. *Salisbury Mills* v. *Townsend*, 109 Mass. 115. *Lowry* v. *Commercial Bank*, Taney, 310. *Bank* v. *Lanier*, 11 Wall. 369. *In re Bahia & San Francisco Railway*, L. R. 3 Q. B. 584. If he had claimed under a transfer which he knew, or was bound to know, to be forged or invalid, a different case would have been presented. *Cottam* v. *Eastern Counties Railway*, 1 Johns. & Hem. 243. *Johnston* v. *Renton*, L. R. 9 Eq. 181. *Tayler* v. *Great Indian Peninsula Railway*, 4 De G. & J. 559. *Denny* v. *Lyon*, 38 Penn. St. 98.

It is contended, upon the precedent of *Ashby* v. *Blackwell*, above cited, that the decree should order the corporation to pay to the other defendant the sum which he paid for the stock. But the reports of that case show that all the parties submitted to the decision of the court, as the only question, whether the purchaser or the company should bear the loss. Where, as in this case, the relief given to the plaintiff does not require or involve the decision of any question between co-defendants, the

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court, unless by consent, does not and cannot decide such a question so as to bind the co-defendants as against each other, but leaves it to be settled in a proper suit between them. *Cottam* v. *Eastern Counties Railway*, and *Johnston* v. *Renton*, above cited. *Cottingham* v. *Shrewsbury*, 3 Hare, 627, 638. *Fletcher* v. *Green*, 33 Beav. 426. *Sewall* v. *Boston Water Power Co.* 4 Allen, 277, 283. *Carlton* v. *Jackson*, 121 Mass. 592, 597.

The result is, that in each case there should be a decree for the plaintiff against the corporation, with costs; and, as to the other defendant, the bill should be dismissed, without costs; this decree to be without prejudice to any question at law or in equity between the co-defendants. *Decrees accordingly.*

G. E. Williams, for the plaintiff.

E. H. Bennett, for the corporations.

J. H. Hardy, for the individual defendant in the first case.

A. S. Wheeler, for the individual defendant in the second case.

IRENE E. BIGELOW *vs.* STATE MUTUAL LIFE ASSURANCE ASSOCIATION.

Suffolk. March 9.—May 6, 1876. Sept. 25, 1876. — Sept. 5, 1877.
SOULE, J., absent.

A policy of life insurance, purporting to be issued by a mutual insurance company, in consideration of a certain sum "paid," and of a like sum to be paid annually, contained the following conditions: "That if said assured shall neglect to pay the annual premiums at the time and in the manner prescribed, this policy shall become forfeited and void except as provided in the St. of 1861, c. 186. That this policy, and any amount which may become due for loss thereon, is assigned and hypothecated to said company, and they have a lien thereon to secure the payment of any premiums or parts thereof on which credit shall have been given, and of any notes or securities given or to be given to said company, and upon non-payment of such notes or securities after the payment of the same shall have become due and have been demanded, said policy shall become forfeited and void. That this policy shall not take effect until the premium is paid." The policy was delivered to the insured, and the company gave him a receipt for the full amount of the first premium. Only half of this premium was in fact paid in cash, and at the same time the insured delivered to the company a memorandum by the terms of which he agreed, in consideration of the company deferring the payment of one half the premium for six months, to pay said sum with interest at the expiration of that time, and that, if not so paid, the insurance should cease and the policy

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become void. *Held*, that the policy was forfeited by failure to pay this note when due, and that the amount of this note must be deducted from the net value of the policy in determining the premium of temporary insurance under the St. of 1861, c. 186.

CONTRACT on a policy of insurance, dated March 1, 1870, on the life of Moses E. Bigelow in the sum of $10,000, issued by the defendant, "in consideration of $539.70 to them paid," "and of a like sum to be paid to them or their duly authorized agent on or before the first day of March at noon, in each year during the term," "for the use of the assured, and, in case of his death before the expiration of this policy, for his wife, Irene E. Bigelow," and payable to him at the expiration of eighteen years, or, in the event of his prior death, to his representatives or assigns.

The policy contained the following conditions: "That if said assured shall neglect to pay the annual premiums at the time and in the manner prescribed, this policy shall become forfeited and void, except as provided in the 186th chapter of the acts of the Legislature of Massachusetts, passed in 1861, entitled 'An act to regulate the forfeitures of policies of life insurance.'*

* "SECTION 1. No policy of insurance on life, hereafter issued by any company chartered by the authority of this Commonwealth, shall be forfeited or become void by the non-payment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the 'combined experience' or 'actuaries'' rate of mortality, with interest at four per centum per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premiums, shall then be cancelled, four fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumptions of mortality and interest aforesaid.

"SECTION 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the payment of premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding: provided, however, that notice of the claim and proof of the death shall be submitted to the

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That this policy, and any amount which may become due for loss thereon, is assigned and hypothecated to said company, and they have a lien thereon to secure the payment of any premiums or parts thereof on which credit shall have been given, and of any notes or securities given or to be given to said company, and upon non-payment of such notes or securities after the payment of the same shall have become due and have been demanded, said policy shall become forfeited and void. That this policy shall not take effect until the premium is paid."

The case was submitted to the court upon an agreed statement of facts in substance as follows:

Moses E. Bigelow died on December 24, 1872, and notice and proof of his death were duly given to the defendant. No question is made but that the plaintiff is the proper party to sue. When the policy was delivered to Moses E. Bigelow, the defendant delivered to him the following receipt, signed by the secretary and countersigned by the agent: "State Mutual Life Assurance Company of Worcester, Worcester, Mass., March 1, 1870. $539.70. Received of M. E. Bigelow five hundred and thirty-nine $\frac{70}{100}$ dollars, amount annual premium on his policy of life insurance, No. 7168, due March 1, 1870." And Bigelow then and there signed and gave to the defendant the following memorandum: "State Mutual Life Assurance Company of Worcester, Boston, Mass., March 1, 1870. $270.00. In consideration that the State Mutual Life Assurance Company of Worcester defer the payment of two hundred and seventy dollars, being one half the premium on policy No. 7168, for the term of six months, I hereby promise and agree to pay said sum, with interest at the rate of seven per cent., at the expiration of said term; and it is expressly understood and agreed that this arrangement is made upon the express condition that if the above named premium and interest shall not be paid at the time specified, then said assurance shall cease and the policy become void." At the same time Bigelow paid to the defendant in cash the remainder of the

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company within ninety days after the decease: and provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount at six per cent. per annum of the premiums that had been forborne at the time of the death."

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first annual premium stated in the policy to have been paid at the delivery of the policy. Neither Bigelow, nor any person for him, ever made any further payment for or on account of the policy, either as first premium or otherwise. At the maturity of the note, the defendant sent a notice by mail to Moses E. Bigelow, the plaintiff's agent, demanding payment thereof, and also carried the note to the last place of business of the assured within this Commonwealth for the purpose of presenting it to him for payment; but he had before that time left the Commonwealth and gone to reside elsewhere in parts unknown, and had no agent in Massachusetts, and never returned or had any other place of business in this state.

If the policy became wholly forfeited, then, whether it was forfeited at the maturity of the note by reason of its non-payment, or at the date when the second annual premium became payable, its net value would not be sufficient to continue it in force under the St. of 1861, *c.* 186, § 1, until the death of the assured, if the amount of the note is to be deducted from said net value. But if the amount of the note is not to be deducted, then the net value was sufficient to keep the policy in force under said statute until the date of the decease of said assured.

Nor would the net value be sufficient to keep the policy in force until the death of the assured, if the net value is to be computed upon the cash payment alone, neither including the amount of the note in the same, nor deducting it therefrom; that is to say, the cash payment alone, if no note had been given, would have been insufficient to keep the policy in force until the death of the assured. But if the note is to be treated as equivalent to cash, and not to be deducted from said net value, then the entire amount of both cash and note would suffice to maintain the existence of the policy until after the death of the assured.

If on these facts the plaintiff could recover, judgment was to be entered for her, the amount to be determined by an assessor; otherwise, judgment for the defendant.

The case was argued in March, 1876, and in May following judgment was ordered for the plaintiff. The defendant thereupon moved for a rehearing, which was granted, and the case reargued in writing in September, 1876.

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J. A. Somerby, for the plaintiff.

D. Foster & A. D. Foster, for the defendant.

By the Court. Upon a reconsideration of this case, with the aid of the elaborate arguments of counsel, the majority of the court is of opinion that it cannot be distinguished in any essential particular from the recent case of *Pitt* v. *Berkshire Ins. Co.* 100 Mass. 500, and that that case must govern this. As it is not likely that another case will arise, presenting such a complicated, and in some respects inconsistent, series of contracts, it would serve no useful purpose to discuss it in detail.

Judgment for the defendant.

Eliphalet N. Badger *vs.* James P. McNamara & another.

Suffolk. Nov. 22, 1876.—Sept. 5, 1877. Ames, Endicott & Soule, JJ., absent.

A bill in equity, alleging that the defendant had agreed to pay the plaintiff a certain commission upon merchandise consigned to the defendant, either by the plaintiff or by other persons; that large amounts had been so consigned, but to what extent the plaintiff was ignorant; that the accounts were too complicated to be conveniently adjusted in an action at law; and praying for an account and for a discovery of such other persons, cannot be maintained; either for an account or for discovery, if the bill waives an answer under oath.

Bill in equity, filed August 9, 1876, against James P. McNamara and M. J. Waldron, copartners, containing the following allegations:

That on the day therein mentioned the plaintiff and the defendants made the following agreement: "This agreement, made this first day of January, eighteen hundred and seventy-five, by Eliphalet N. Badger, of Chelsea, Mass., and James P. McNamara & Co., of Chicago, Ill., witnesseth, that the said Badger agrees to act for said McNamara & Co., as their eastern agent, to solicit consignments of merchandise, receive their money and make advances (at their risk) for account of said McNamara & Co., and attend to the forwarding of such merchandise; to furnish his own office in Boston free of charge, and pay his own travelling expenses. That said McNamara & Co

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agree to pay to said Badger, as compensation for such service, a commission of two per cent. on all rates of merchandise consigned to them from New England, on and after this date, excepting only the parties whose names are recorded on the back of this agreement. It is further agreed, that said Badger may draw for one hundred dollars per month; and that every ninety days said McNamara will make up and settle the account in full. This agreement may be cancelled by either party whenever dissatisfied with its terms or its fulfilment, on giving a written notice to the other party, it being understood and agreed that said Badger shall receive his commission on all goods consigned up to the date of such cancelling, unless some other settlement can be mutually agreed upon." [On the back of this agreement were the names of certain persons and firms.]

That from January 1, 1875, to August 1, 1876, the plaintiff acted under this agreement as the eastern agent of the defendants, and faithfully performed the whole duty required of him under the agreement.

That on July 20, 1876, the defendants gave the plaintiff, and he received, a written notice of the cancellation of the agreement, and that the cancellation would take effect on August 1, 1876.

That while the agreement was in force, very large amounts of merchandise were received and sold by the defendants, consigned to them by persons and firms in New England other than those excepted on the back of the agreement; that the amounts and value and articles of all the merchandise so received and sold by the defendants, the plaintiff is ignorant of, but he is informed and believes and avers that the sales thereof amount in all to $400,000.

That while the agreement was in force, the plaintiff repeatedly called upon the defendants to render to him accounts, as provided by the agreement, but that they have always refused so, and have never rendered him an account.

That the plaintiff has no means of ascertaining, and does not know, the names of the persons and firms, other than those excepted on the back of the agreement, who consigned merchandise from New England to the defendants during that period but he is informed and believes and avers, that more than two

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hundred persons and firms, other than those excepted on the back of the agreement, consigned merchandise from New England to the defendants, and that the defendants received and sold the same during that period; that the defendants refuse to disclose to the plaintiff the names of such persons and firms, although thereto requested by him.

That $2350 is the whole amount the plaintiff has received from the defendants under the agreement, but that, by reason of their refusing to render him any account whatever, and his not knowing, and not having the means to ascertain, the names of the persons and firms other than those excepted on the back of the agreement, who consigned merchandise from New England to the defendants during that period, and the defendants refusing to disclose such names, he is unable to state the sum of money the defendants now owe him, but he is informed and believes and avers it to be $5000.

That the nature of the accounts is such that they cannot be conveniently and properly adjusted and settled in an action at law.

The bill waived an answer under oath, and prayed for an account, a discovery of the names of those who had consigned merchandise to the defendants from New England, other than those named on the back of the agreement, and for further relief.

The defendants demurred, on the ground that the plaintiff had a plain, adequate and complete remedy at law.

Hearing, on the bill and demurrer, before *Devens*, J., who overruled the demurrer; and the defendants appealed to the full court.

J. Fox, for the defendants.

E. S. Mansfield, for the plaintiff, cited *Ferry* v. *Henry*, 4 Pick. 75; *Miller* v. *Lord*, 11 Pick. 11, 25; *Ewer* v. *Hobbs*, 5 Met. 1, 7 *Bartlett* v. *Parks*, 1 Cush. 82, 86; *Locke* v. *Bennett*, 7 Cush 445, 449; *Hallett* v. *Cumston*, 110 Mass. 32.

GRAY, C. J. In order to maintain a bill in equity for an account, it must appear from the specific allegations that there was a fiduciary relation between the parties, (which is not here contended,) or that the account is so complicated that it cannot be conveniently taken in an action at law. The general allegation that the account is of such a character is not sufficient to sustain

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the jurisdiction in chancery. The object of the present bill is to recover a fixed commission upon merchandise consigned to the defendants, either by the plaintiff or by other persons. The plaintiff must know the amounts of his own consignments, and he expressly waives the oath of the defendants. He therefore makes no case for invoking the equity jurisdiction of this court, either for relief or for discovery. *Frue* v. *Loring*, 120 Mass. 507. *Blood* v. *Blood*, 110 Mass. 545. *Fowle* v. *Lawrason*, 5 Pet. 495. *Dinwiddie* v. *Bailey*, 6 Ves. 136. *Foley* v. *Hill*, 2 H. L. Cas. 28. *Smith* v. *Leveaux*, 2 De G., J. & S. 1. *Moxon* v. *Bright*, L. R. 4 Ch. 292.

The case wholly differs from those between partners, or in which, though the parties may not be technically partners, the account between them is to be settled upon the same principles as if they were, and requires the investigation of mutual charges and credits, as in *Bartlett* v. *Parks*, 1 Cush. 82, and *Hallett* v. *Cumston*, 110 Mass. 32.

Demurrer sustained and bill dismissed.

FRANCIS A. HALL & another *vs.* LYDIA Y. HALL & others.

Suffolk. March 28. — Sept. 6, 1877. AMES & LORD, JJ., absent.

A testator, whose daughter (who was forty-six years of age and had been a widow for four years prior to the date of the will) and her children survived him, by his will bequeathed a certain sum in trust "to accumulate until my said grandchildren last mentioned respectively attain the age of thirty-five years, when a proportionate part of said fund and accumulation (dividing by the number of said grandchildren then living who shall not have received their share) is to be paid over to each of them; and in case of the last beneficiary, before attaining the age of thirty-five years, I direct that the remainder of said fund and accumulation be considered as part of the residue of my estate." The will contained no prior mention of any grandchildren. *Held*, that unless the words "said" and "last mentioned" were rejected, the bequest was void for uncertainty; that, if rejected, the bequest was void for remoteness; and that the residuary legatee was entitled to the fund.

BILL IN EQUITY by Francis A. Hall and Henry A. Whitney, executors of, and trustees under, the will of Andrew T. Hall, to obtain the instructions of the court.

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The will, dated July 9, 1875, and admitted to probate January 3, 1876, after bequeathing and devising the residue of the testator's estate to his wife for life, and, after her death, to his daughter absolutely, contained, besides other provisions not material to be stated, the following:

"I also give and bequeath to the said Francis A. Hall and Henry Austin Whitney, if they or either of them shall be living at the time of my decease, the sum of five thousand dollars, in trust. The whole shall form a fund which shall properly be invested, and to accumulate until my said grandchildren last mentioned respectively attain the age thirty-five years, when a proportionate part of said fund and accumulation (dividing by the number of said grandchildren then living who shall not have received their share) is to be paid over to each of them; and in case of the last beneficiary, before attaining the age of thirty-five years, I direct that the remainder of said fund and accumulation be considered as part of the residue of my estate, and be subject to the disposition of the same heretofore made." The will contained no prior mention of any grandchildren.

The bill alleged, and the answers admitted, that the testator died on November 22, 1875, leaving a widow, Lydia Y. Hall, a daughter, Mary A. H. Munroe, who was born on or about August 19, 1829, and was a widow, (her husband having died in December, 1870,) and seven grandchildren, and presented the question whether the bequest to the executors as trustees was not void for uncertainty and remoteness. Hearing upon the bill and answers before *Devens*, J., who reserved the case for the consideration of the full court.

F. Dabney, for the widow and daughter.

L. S. Dabney, for the grandchildren. 1. The bequest is not void for uncertainty. 1 Jarman on Wills, 329–333. 2 Ib. 108–111.

2. A bequest by a testator to living grandchildren, to be distributed among them when they severally attain the age of thirty-five years, is not open to objection as creating a perpetuity, and no perpetuity can be evoked here, without assuming that Mrs. Munroe may marry again and give birth to some more children after the death of the testator, and that such after-born children will be entitled to share in the bequest, either upon the

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ground that the bequest to the grandchildren is contingent upon their respectively attaining the age of thirty-five years, or, if vested at the testator's death, that the period of enjoyment is postponed to a later date. The admission of after-born children to a share, in cases of bequests to children, is founded upon a presumption that the testator might naturally have contemplated the possibility of other children, and that it is his will that they should share. They come in when such is the clear intention of the will. *Hatfield* v. *Sohier*, 114 Mass. 48. Nothing is more improbable, under the circumstances of this case, than that any such possibility ever entered the mind of the testator.

The bequests to the grandchildren of the testator vested, at his death, in those then living, subject to be divested by their death before reaching the age for enjoyment, and, if it was also subject to open to let in after-born grandchildren, it would vest in such after-born grandchildren upon their birth; and, as no grandchild could be born after Mrs. Munroe's death, the whole estate must vest within the time limited by the rule. This must be the construction of the will, because it is a possible construction, and one which would carry out the will of the testator, while to construe the estate as contingent would defeat that will, and because it is in harmony with the decisions of this court. *Packard* v. *Packard*, 16 Pick. 191. *Blanchard* v. *Blanchard*, 1 Allen, 223. *Loring* v. *Blake*, 98 Mass. 253. *Pike* v. *Stephenson*, 99 Mass. 188. *Gardiner* v. *Guild*, 106 Mass. 25. *Lovering* v. *Worthington*, 106 Mass. 86. *Hatfield* v. *Sohier*, 114 Mass. 48. 1 Jarman on Wills, 260.

If by assuming that more grandchildren may be born, and by adopting a construction which admits them to share, the period of accumulation permitted by the rule may be exceeded by giving effect to the directions of the will, this will be the result: the direction to accumulate and the limitation over are void; there is a bequest "in trust for my grandchildren;" those living at the testator's death will be entitled to the immediate enjoyment and an immediate conveyance, because the estate of the trustees will be merely a naked trust to receive the money; and any grandchildren born after the testator's death will be excluded. *Odell* v. *Odell*, 10 Allen, 1. *Sears* v. *Putnam*, 102 Mass. 5.

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If the court construes the gift as one to all the grandchildren of the testator, living at his death or born afterwards, and contingent upon their respectively attaining the age of thirty-five years, the case which then arises is not the case of a contingent gift to a class of grandchildren generally, to be divided among those living at the happening of a future event, or among those who shall survive to a particular age; but it is the case of a particular gift to each grandchild, contingent upon his or her living to a certain age, of a sum of money, the amount to be ascertained in a particular way pointed out in the will. The question presented, then, is not whether a class can take, but whether particular individuals can take. The testator has himself split his bequest into portions, and has made it a series of particular legacies. Therefore, the reason given by Sir W. Grant, in *Leake* v. *Robinson*, 2 Meriv. 363, for refusing to sustain the bequest in part, is inapplicable here. And so this bequest, even if void as to all after-born grandchildren, may be held good as to all living at the death of the testator.

The case at bar cannot be distinguished from *Hubbard* v. *Lloyd*, 6 Cush. 522; and is distinguished from *Fosdick* v. *Fosdick*, 6 Allen, 41, in these respects: The devise there was of an income to grandchildren as a class, to be equally divided between them, at the end of a period which might exceed the period limited by the rule. The remainder was given to legal heirs of grandchildren, and they could not be ascertained till the contingency happened, therefore the remainder was contingent, and the happening of the contingency might be deferred beyond the period limited by the rule. The income, which was to be di vided among the tenants for life, could not come into existence until the happening of a contingency, which might be deferred beyond the period limited by the rule. It could not vest till it existed, and the persons, who were then to share it, could not be ascertained till the time for sharing came. Hence there were no vested life estates at the death of the testator as in *Loring* v. *Blake*.

MORTON, J. Before the clause presented for our consideration, the will makes no mention of any grandchildren. The clause is, therefore, void for an uncertainty, or the words "said" and "last mentioned" must be rejected as inadvertently used,

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and the clause be construed as a bequest to his grandchildren as a class. Adopting the latter construction, as most favorable to the grandchildren, and as most probably carrying out the intentions of the testator, the question is presented whether the bequest is void because it violates the rule against perpetuities.

It is a testamentary gift to a class of persons, which is made by the testator to take effect at a period beyond the time of his death; and the general rule applies, that those who come within the description, before the period or event upon which the gift is to take effect or the distribution is to be made, will be included as within the probable intention of the testator. Therefore any grandchild of the testator who might be born after his death would be entitled to a share of the fund. *Fosdick* v. *Fosdick*, 6 Allen, 41, and cases cited. *Worcester* v. *Worcester*, 101 Mass. 128. *Hatfield* v. *Sohier*, 114 Mass. 48. And we are of opinion that under this bequest the grandchildren of the testator take contingent interests, which do not vest until they respectively arrive at the age of thirty-five years. There is no provision for their maintenance, or for any enjoyment by them of the principal or income of the trust fund, until they reach the prescribed age; the accumulations accrue after the death of the testator, and could not vest at that time; the persons who are to take at the period of distribution and the amounts to which they may be entitled are uncertain; and the clause contains a gift over in case the last surviving grandchild shall die before reaching the age of thirty-five years. All these considerations point to the conclusion that it was the intention of the testator that the interests of the grandchildren should not vest until the contingency of their arriving respectively at the prescribed age should happen.

This being so, the gift is void for remoteness. The rule is that executory limitations are void unless they take effect *ex necessitate* and in all possible contingencies within the period of a life or lives in being at the death of the testator and twenty-one years afterwards. *Sears* v. *Putnam*, 102 Mass. 5, and cases cited.

In the case at bar, at the death of the testator, it was possible that his widowed daughter might marry again and have a child, and that the daughter and all the grandchildren of the testator living at his death might die, and that these events might happen before the oldest grandchild reached the age of thirty-five years,

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or even within one or two years of the death of the testator. In this contingency the after-born grandchild would be the sole beneficiary entitled to the trust fund, and it would not vest in him until he arrived at the age of thirty-five years. Therefore the fund might be inalienable for a period longer than any life in being at the death of the testator and twenty-one years in addition, and the bequest is void under the rule against perpetuities. *Thorndike* v. *Loring*, 15 Gray, 391.

This bequest being void, it is clear that the sum bequeathed falls within the residuary devise and bequest to the widow of the testator, and should be paid to her as a part of the residue.

Decree accordingly.

JOHN W. TEMPLE *vs.* JAMES B. TURNER.
EDMUND WATFORD *vs.* EDWARD ELLIS.

Suffolk. March 6. — Sept. 7, 1877. ENDICOTT & SOULE, JJ., absent.

A seaman may maintain an action against a master of a vessel for his wages, by proof that he shipped at a fixed rate of wages per month, on the vessel of which the defendant was at the time master, and served until discharged by him, although there is no other evidence of a contract made by the master with the seaman.

TWO ACTIONS OF CONTRACT, each upon an account annexed, for services on board a vessel, of which the defendant was the master.

At the trial of the first case in the Superior Court, before *Brigham*, C. J., the plaintiff testified that he shipped at London, England, upon a ship, of which the defendant was master, at the rate of £3 5*s*. per month in gold; that he had received certain payments of wages; that the defendant still owed him the remainder; that he served continuously on the ship from the time he shipped until he left. Another witness testified that the defendant discharged the plaintiff at his request, and said he was willing to pay him off and give him his clothes, and gave directions to his mate to deliver the clothes. It was agreed that £1 in gold should be estimated as of the value of $5.58.

The judge ordered a verdict for the defendant, and reported the case for the determination of this court.

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At the trial of the second case, before *Bacon*, J., the plaintiff introduced evidence tending to show similar facts to those in the first case, in regard to his service on board, and the rate of gold, and that he ceased to perform his duties on the ship by the express command of the defendant, and was ordered ashore by him. The judge ordered a verdict for the defendant, and reported the case for the determination of this court.

J. M. Browne, for the plaintiffs.

O. W. Holmes, Jr., for the defendants. The contract under which the plaintiff in each case shipped appears to have been express, in the strictest sense, but there is no evidence as to who made it or what were its terms, and the question is whether the plaintiff has supported the burden of proving a contract personally binding the defendant, by evidence tending to show no more than that the defendant was master of the vessel. In general, to charge an agent or servant upon a contract made by the authority and for the benefit of a principal or master, it must appear that the servant made the contract, and that, if the contract was in writing, it contained apt words to charge him, or, if it was oral, that the language used authorized the credit to be given to him, and that credit was so given. An agent or servant is only charged on a contract on behalf of another on the ground that he has made it his contract. The same principles apply to the case of the master of a vessel, with regard to services performed on board a ship commanded by him. If he is charged, it is because he is shown to have made a contract, and has made it in such a form that it is his contract, on one of the grounds just stated. *Goodridge* v. *Lord*, 10 Mass. 483, 486, 487. *James* v. *Bixby*, 11 Mass. 34, 37. *Hoskins* v. *Slayton*, Cas. temp. Hardwicke, 376. *Garnham* v. *Bennett*, Stra. 816. *Rich* v. *Coe*, Cowp. 636, 639. *Farmer* v. *Davies*, 1 T. R. 108. *Hussey* v. *Christie*, 9 East, 426, 432. *Priestly* v. *Fernie*, 3 H. & C. 977, 984–986.

Especially must this be true when the contract is expressed in words, oral or written. This appears here, for the evidence is that the plaintiff shipped at a specified rate of wages, which could not otherwise have been the case. That contract not being in evidence, *non constat* who made the special promise; and if the service is rendered "on a special promise from either, the

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other is discharged." *Garnham* v. *Bennett*, *ubi supra*. Nor does it appear whether it was in writing or oral, and whether, therefore, if made by an agent, it showed an intention to charge him, as a matter of construction or on the ground that credit was given to him.

The obscurity which has surrounded this class of questions arises from the fact that admiralty law has been a compound of doctrines springing from various systems at various stages of society, and cannot be understood except by the aid of history, which will also help to rid it of its incongruities. Modern authorities properly reduce the relation of shipmaster and owners to an ordinary case of agency; but the law of agency, as now understood, is for the most part modern. It was an exception and a comparatively late innovation in the Roman law. *Mandatum* was not agency. A master might be liable for his slave, but not one *paterfamilias* for the act of another. A free citizen *sui juris* was liable for his own acts if anybody was. On special grounds of policy, the prætor allowed the master of a ship, of whatever condition, to impose a liability on the owner in certain cases. D. 14, 1, 1, § 4. But the fiction by which one freeman is wholly absorbed under the *persona* of another was not then developed, and the liability of the person actually making the contract, which was the only liability known to the old law, remained, notwithstanding the secondary responsibility which was added to it. The mediæval maritime law showed a further development. The master could bind the ship, although on modern principles he was in no sense the agent of the owners to whom the ship belonged. Traces of this doctrine still remain, indeed, in the admiralty law, although it is disappearing. But at that time he could not bind the owners personally. Now, however, the conception of agency has been developed, and the master can bind the owners on the one hand, while, on the other, the liability of the ship in most cases, and that of the owners in all, is determined by considering what actual or seeming authority the master had to represent them. But it is part of the law of agency that a man may make himself a mere conduit pipe, through which a contract moves from his principal. And, as the responsibility of the superior is wholly determined by that law, 't is supposed that the same is true of the inferior, as laid down in *Priestly* v. *Fernie*, already cited.

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In the present case, it does not appear that the defendant was even on board the ship when the plaintiff made his contract, or had anything to do with engaging the plaintiff. If he did not personally make the contract, the only possible foundation for charging him disappears. *Farmer* v. *Davies*, 1 T. R. 108.

GRAY, C. J. The general rule is everywhere recognized that a seaman has a threefold remedy for his wages, against the master, the owner, or the ship, and may proceed, at his election, against either of the three in the admiralty, or against the master or the owner at common law. *The Jack Park*, 4 C. Rob. 308, 311. *Aspinwall* v. *Bartlet*, 8 Mass. 483, 486. Abbott on Shipping, pt. 5, *c.* 4. 3 Kent Com. 196. "It is an established rule," said Dr. Lushington, "so ancient that I know not its origin, that the seamen may recover their wages against the master." *The Salacia*, Lush. 545, 548. The liability of the master has sometimes been put upon the ground of his relation to the seamen, and his right to receive the freight out of which their wages are to be paid. But the reason commonly assigned, and a sufficient one for these cases, is that, according to the usual practice in the merchant service, the master makes an express contract with the seamen. *Bayly* v. *Grant*, 1 Salk. 33. *Buck* v. *Rawlinson*, 1 Bro. P. C. (2d ed.) 137. *Mayo* v. *Harding*, 6 Mass. 300. *Bishop* v. *Shepherd*, 23 Pick. 492, 495. *Wysham* v. *Rossen*, 11 Johns. 72. The English statutes and our own from early times have provided for such contracts. Sts. 2 Geo. II. *c.* 36; 2 Geo. III. *c.* 31; 17 & 18 Vict. *c.* 104, § 149. Mass. Col. St. 1668; 4 Mass. Col. Rec. pt. ii. 390, 391; Anc. Chart. 717, 718. U. S. St. July 20, 1790, § 1. U. S. Rev. Sts. § 4520. It is not to be presumed, without the most positive and satisfactory proof, that the crew gave exclusive credit to the owner. Story on Agency, § 299. *United States* v. *Haines*, 5 Mason, 272, 275.

It follows that the evidence introduced at the trial of each of these cases was sufficient to maintain the action, and that the verdicts which were ordered for the defendants must be

Set aside.

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ROBERT M. MORVILLE *vs.* AMERICAN TRACT SOCIETY.

Suffolk. March 6, 7. — Sept. 7, 1877. ENDICOTT & SOULE, JJ., absent.

A corporation chartered for the purpose of publishing pious and useful books and tracts for distribution among the ignorant and destitute, with power to sue and be sued, to appear in court to prosecute and defend to final judgment and execution, to take, possess and apply to the purposes of the corporation any moneys which may be given for immediate use, to hold as a permanent fund any estate, whether real or personal, the yearly income of which shall not exceed fifteen hundred dollars, the same to be faithfully appropriated to the object aforesaid, and not otherwise, may, if its income from the permanent fund does not exceed that amount, receive a sum of money on the condition that it will return it, if an additional amount is not raised within a certain time; and, if a demand is made for the return of the money, on the ground that the condition has not been complied with, may submit the demand to arbitration under the Gen. Sts. c. 147.

If a corporation, in excess of the powers conferred by its charter, receives a sum of money on condition that it will return it, if an additional sum is not raised within a given time, and the condition is broken, an action may be maintained against the corporation on an implied promise to return the money, and a demand for its return may be submitted to arbitration.

On the issue whether a corporation, which had received a sum of money on certain conditions, was induced, on an alleged failure to perform the conditions, to enter into an agreement of submission to arbitration by the concealment of material facts, evidence that authority was given by the other party to its treasurer to appropriate a part of the money for another purpose; that the corporation itself at the hearing before the arbitrators proved such appropriation by its treasurer; and that the arbitrators allowed the sum so appropriated in reduction of the sum received by the corporation, is insufficient, and is no evidence of a waiver of the conditions upon which the corporation held the balance of the money.

Objections that an award exceeds the submission, and that the claim submitted has been materially altered in its terms, are not sustained by evidence, the only effect of which is to reduce the claim and not to change its character.

An exception cannot be sustained to the exclusion of evidence which is not reported or stated in the bill of exceptions.

At a hearing upon a motion to accept an award of three arbitrators in favor of A. against a corporation, it was objected that one of the arbitrators was improperly influenced by A., and the judge, before whom A. and the arbitrator appeared as witnesses, found as facts that they were familiarly acquainted; that before the submission to arbitration A. had honestly stated the principal facts in the case to him; and that upon these facts the arbitrator had expressed the opinion that no commercial house could stand upon the transaction; and ordered judgment on the award. *Held*, that no error in law appeared.

MOTION in the Superior Court to accept an award of three arbitrators upon a submission, entered into before a justice of the peace under the Gen. Sts. c. 147, § 1, of the following de-

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mand: "The right of R. W. Morville to recover from the American Tract Society the sum of $5000 alleged to have been given in the month of March 1869, by said Morville (under the assumed name of 'Union') to said society, and by said society to have been received and accepted upon certain conditions, to be by said society performed, which it is alleged have not been fulfilled, and for breach of which said sum is claimed with interest."

The award of the arbitrators, signed by all of them, after stating that the parties appeared before them, presented their evidence, and were heard by counsel, proceeded as follows: "Whereupon the undersigned considered the matter, and do now determine and award that the said Robert W. Morville shall receive and recover from the said American Tract Society the sum of $4,600, which shall be in full for all claim for principal and interest upon the said demand submitted to us; and we do further award that the costs of this arbitration shall be paid by the said American Tract Society, which costs we do assess and tax at the sum of $200."

The arbitrators annexed to the award the following writing as the foundation of the claim submitted to them:

"Boston, March 15, 1869. $5000. The American Tract Society acknowledge the receipt of five thousand dollars from a friend, under the name of Union, to whom the same shall be repaid, in case the society is not allowed to retain its catholic condition, and unless fifty thousand dollars be raised for evangelization purposes. Julius A. Palmer, Treas., by J. Wyeth Coolidge, Ass't Treas'r."

On this paper was the following indorsement: "Boston, May 20, 1870. It has been observed by the donor that the term of five years, in which the sum of $50,000 was to be raised, was not specified in the receipt, and he requests me to state that that was the understanding, which I hereby do state and acknowledge.

"J. Wyeth Coolidge."

The defendant objected to the acceptance of the award, on various grounds, the following being those relied upon at the argument:

"1. That it was not competent for the defendant to submit the demand to arbitration.

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"2. That it was not competent for the defendant to make the contract.

"3. Because the defendant was induced to enter into the agreement to arbitrate by the concealment on the part of the plaintiff of material facts known to him and unknown to the defendant; that the plaintiff had, by authorizing and assenting to the misappropriation of the whole of said $5000 to the constitution of life members of said society, waived all conditions and made the gift absolute.

"4. Because the award considered and decided demands not included in the submission, to wit, what sum of money was due from said plaintiff to said society on account of life members of said society constituted by his authority and at his request.

"5. Because the award is not certain and final upon all the demands considered by the arbitrators.

"6. Because the claim in evidence, submitted by the plaintiff, was at his request, without the knowledge or authority of the defendant, materially altered in its terms, and was therefore null and void.

"7. Because the plaintiff, without the knowledge of the defendant, communicated, advised and consulted with one of the arbitrators, while the cause was under consideration, in relation to the case, and in relation to facts material to the decision thereof.

"8. Because the award was and is so grossly erroneous and unjust, and so utterly unwarranted by and contrary to the evidence offered, as to constitute misconduct on the part of the arbitrators, for which the award ought to be set aside.

"9. That one of the arbitrators had formed and expressed an opinion upon the matters to be submitted, in favor of the plaintiff, on an *ex parte* statement of the facts by the plaintiff to him before he was appointed as arbitrator, which fact was not known to the defendant."

Hearing before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The defendant, for the purpose of supporting the 8th objection, offered all the evidence heard by the arbitrators. This evidence was ruled to be incompetent, and rejected.

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For the purpose of supporting the 3d and 4th objections, the defendant offered evidence that the plaintiff, three or four months after the contract annexed to the submission, orally consented with the defendant's treasurer that the $5,000 referred to in said contract might be appropriated to constitute certain persons, designated by the plaintiff, life members of the defendant society, and that, under this consent, $600 of said $5000 was thus appropriated; that the plaintiff had, and the defendant, excepting by its treasurer exclusively, had not knowledge of such consent and appropriation when the submission was made; that during such arbitration, upon the discovery of such agreement and appropriation, upon the defendant's petition and without objection by the parties, the arbitrators received evidence, heard the parties upon the matter of said consent and appropriation, and considered the same and allowed to the defendant in said award, and in reduction of said sum of $5000, the sum of $600 thus appropriated. The judge ruled that the evidence thus offered was not competent for the purpose of avoiding the award, and that it did not support any of the objections made thereto by the defendant, and rejected the evidence.

In support of the 8th and 9th objections, the judge, without objection by the parties, heard the testimony of the plaintiff, called by the defendant, and of one of the arbitrators, Samuel T. Snow, called by the plaintiff, and upon their testimony found the following facts:

The plaintiff, after demanding of the defendant's treasurer, Gilman, the repayment to him of the said sum of $5000, communicated to Snow in the course of several conversations — they being familiar acquaintances and frequent visitors at the houses of each other — all the principal facts of the transaction between the plaintiff and the defendant, which subsequently became the matters of the arbitration and award; and Snow formed and expressed an opinion upon such facts, to the effect that no commercial house in State Street could stand upon such a transaction as that of the American Tract Society; and, in the course of such conversations, advised the plaintiff, in consideration of his age, and to avoid the vexation of a lawsuit, to submit the said matter between him and the defendant to arbitrators; and subsequently, by request of the plaintiff, gave his consent to the

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plaintiff to be one of the arbitrators of said matter. After Snow's consent thus to act, the plaintiff on several occasions, at Snow's place of business, began to talk with Snow upon the matter of the arbitration, but Snow, without absolutely refusing to hear the plaintiff, and without hearing any details of the matter, advised the plaintiff to make no statements to him, but to reserve them until the hearing before the arbitrators; and after the first meeting of the arbitrators (when there was no hearing) the plaintiff retained counsel, and, after that retainer, Snow, when the plaintiff proposed to talk with him in the matter in arbitration, advised him to go to his counsel. The plaintiff, without any declaration or assurance or ground of expectation to that effect from Snow, except such as may appear in these facts found, relied upon Snow to look out for his interest in the matter of the arbitration. There was no evidence that the defendant before the award had notice of these facts in relation to Snow, and the judge found that it had no such notice. No other facts or evidence appeared at the hearing upon the motion for judgment upon said award, affecting the impartiality or conduct of said Snow as an arbitrator in the matter of said award, excepting the evidence and facts stated. In relation to the other arbitrators, there was no evidence affecting their impartiality or conduct as arbitrators in the matter of said award.

The foregoing is a statement of all the evidence in relation to said submission, arbitration, hearing or award offered, and of all the facts found or of which there was any evidence in the Superior Court, in addition to the original submission and award and papers annexed thereto. Upon the subject of the indorsement upon the defendant's contract no evidence was offered by either party or in relation to the number or names of the persons designated to be or constituted life members.

Judgment was ordered for the plaintiff upon the award; and the defendant alleged exceptions.

J. W. May, for the defendant. As to the 1st and 2d objections: Under the provisions of its charter the defendant had no power to take money except for immediate use, in pursuance of the general purposes of the society, or to constitute a fund, the yearly income of which would not exceed fifteen hundred dollars. Sts. 1816 *c.* 72, § 1; 1823, *c.* 49. *Balfour* v. *Ernest*, 5

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C. B. (N. S.) 601. *East Anglian Railways* v. *Eastern Counties Railway*, 11 C. B. 775. *In re National Permanent Benefit Building Society*, L. R. 5 Ch. 309. *Hood* v. *New York & New Haven Railroad*, 22 Conn. 502. *Pearce* v. *Madison Railroad*, 21 How. 441. *Police Jury* v. *Britton*, 15 Wall. 566. *Whitwell* v. *Pulaski Co.* 2 Dillon, 249. *Andrews* v. *Union Ins. Co.* 37 Maine, 256. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 104 Mass. 1. *Wiley* v. *Bank of Brattleboro*, 47 Vt. 546. *Fowler* v. *Scully*, 72 Penn. St. 456. *Matthews* v. *Skinker*, 62 Misso. 329. *Weckler* v. *Bank of Hagerstown*, 42 Md. 581. And, as the contract is upon its face in excess of the power conferred by its charter upon the society, the holder takes it with notice, and cannot recover.

The evidence offered in support of the 3d objection was competent. *Van Cortlandt* v. *Underhill*, 17 Johns. 405.

As to the 4th and 5th objections: The only demand submitted was the right of the plaintiff to recover from the society the sum of $5000, alleged to have been given and accepted upon certain conditions, to be by the society performed, which it was alleged had not been fulfilled. If the misappropriation, proved for the purpose of showing that the plaintiff had waived the alleged conditions upon which the gift was made, could be considered in the nature of a claim in set-off, then the arbitrators should have found and stated the amount of the claim.

As to the 6th objection: Any alteration affecting the time when a note becomes payable vitiates the contract. *Homer* v. *Wallis*, 11 Mass. 309. *Davis* v. *Jenney*, 1 Met. 221. *Ives* v. *Farmers' Bank*, 2 Allen, 236.

As to the 7th objection: Any communication made by one party to a submission, without the knowledge of the other, while the arbitrators have the cause under consideration, attempting to influence them in his own favor, or to prejudice them against the other party, will avoid the award, if seasonably objected to by the latter; because the court cannot know that it did not affect the minds of the arbitrators, and must protect the innocent party from the possibility of being injured by the unlawful attempts of the other party. *Johnson* v. *Holyoke Water Power Co.* 107 Mass. 472. To receive any *ex parte* communication from either of the parties to the controversy during the arbitration is

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misbehavior on the part of the arbitrator which will invalidate the award. *Strong* v. *Strong*, 9 Cush. 560, 570. *Walker* v. *Frobisher*, 6 Ves. 70. *Fetherstone* v. *Cooper*, 9 Ves. 67.

As to the 8th objection: The court is bound to hear any competent evidence which tends to prove the allegation. *Hutchinson* v. *Shepperton*, 13 Q. B. 955. *Burton* v. *Knight*, 2 Vern. 514. *Tracy* v. *Herrick*, 5 Foster, 381.

As to the 9th objection: An award is rightly rejected if, previously to the selection of the arbitrators, one of them made an *ex parte* examination of the matter afterwards submitted, at the request of one of the parties, to whom the substance of the result at which they arrived was known, and these facts were not communicated to the other party. *Conrad* v. *Massasoit Ins. Co.* 4 Allen, 20. In the case at bar, the facts found are, that, before the selection of the arbitrator, the plaintiff, in the course of several conversations, communicated to Snow all the principal facts of the transaction between the plaintiff and the defendant which subsequently became the matter of the arbitration and award, and that Snow formed and expressed an opinion upon such facts, to the effect that no commercial house in State Street could stand upon such a transaction as that of the American Tract Society; that the plaintiff relied upon Snow to look out for his interests in the matter of the arbitration, and that the defendant had no notice of that fact. See *Perry* v. *Moore*, 2 E. D. Smith, 32; and cases cited above, in support of the 7th objection.

H. D. Hyde, for the plaintiff.

COLT, J. The plaintiff paid five thousand dollars to the American Tract Society, under an agreement with the treasurer of that society that it should be repaid to him in case the society should not be allowed to retain its catholic condition, and unless fifty thousand dollars be raised within five years for evangelization purposes. A receipt for the money, signed by the treasurer, and reciting that agreement, was given to the plaintiff. There was a failure of one of the conditions named, but the society refused to pay the money back to the plaintiff.

The right of the plaintiff to recover the money so given was submitted by the parties to three arbitrators, by a submission entered into before a justice of the peace under the Gen. Sts.

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c. 147. An award in favor of the plaintiff was duly returned to the Superior Court, and many objections were there made by the defendant to its acceptance. It is necessary to consider only those which were relied on at the argument.

1. The defendant insisted that the contract made with the plaintiff and the submission to arbitration of the claims arising under it, were not within the chartered powers of the society. The act of incorporation provides that the persons therein named shall be a body politic, "for the purpose of publishing pious and useful books and tracts for distribution among the ignorant and destitute;" with power to "sue and be sued, plead and be impleaded, appear in court, defend and prosecute to final judgment and execution;" and "take, possess and apply, to the purposes of said corporation, any moneys which may be given for immediate use; and may hold, as a permanent fund, any estate, whether real or personal, the yearly income of which shall not exceed fifteen hundred dollars, and the same shall be faithfully appropriated to the object aforesaid, and not otherwise." St. 1816, c. 72, § 1. Under these provisions, it is contended that the society had no power to take money which was not given for immediate use, and to agree to repay the same if certain conditions were not complied with.

The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied, where there is no positive restriction in the charter. Thus it is not necessary that there should be express authority to borrow money, or to make negotiable paper, if such is the usual and proper means of accomplishing that object. It is the purpose of the charter of the defendant to create a corporation with power to receive and expend for the purposes named all money given for immediate use. If this was all, there would be strength in the position that the power to receive and hold money to any considerable amount or for any great length of time, on deposit, or in trust for any purpose, was not conferred by the charter. But there is another clause which gives the right to hold real and personal estate for the purpose of securing a limited annual income to be appropriated to the objects of the society. Under this provision we think this contract can be supported.

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It must be treated as valid, unless it appears affirmatively to be a contract to do something which is beyond the reasonable exercise of the power granted. We cannot say as matter of law that the right given to a corporation to take and hold property for the purpose of securing a specified yearly income does not imply the right to receive money within the limits named, upon giving an agreement to return it upon conditions which are not illegal and do not violate its charter, and under which the income of the money is secured to the corporation, so long as the right to hold the fund so obtained continues. To hold otherwise would be to declare void many conditional gifts to charitable and educational institutions. It is enough that an award by arbitrators, having full power to settle the facts as well as the law between the parties, cannot be set aside because the defendant is held responsible on such a contract.

There is another answer to this objection which is equally satisfactory. The question is upon the acceptance of the award; no question of pleading is involved. The award is binding, if in any form of action the plaintiff is entitled to recover. If the defendant were to be allowed the full benefit of the point made, the plaintiff could only be prevented from enforcing his express contract. The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises when the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmance of an illegal act.

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The right to recover the money upon the implied promise, under like circumstances, has been heretofore recognized by this court.

In *White* v. *Franklin Bank*, 22 Pick. 181, where an express contract was made by a bank for the payment of a deposit at a future day certain, against the prohibition of the Rev. Sts. *c.* 36, § 57, it was held that, while no action could be maintained by the depositor upon the express contract, yet he might recover back the money, without a previous demand, in an action commenced before the expiration of the time, the parties not being *in pari delicto*, and the action being in disaffirmance of the illegal contract. The general proposition, that where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, it may be recovered back, was laid down in that case by Wilde, J., who declared it to be, not only consonant with principles of sound policy and justice, but to have been now settled by authority, whatever doubt may have been formerly entertained. "To decide," he adds, "that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition."

Again, in *Dill* v. *Wareham*, 7 Met. 438, where a town made a contract with reference to certain fisheries within its limits which it had no authority to make, and which it refused to perform, it was decided that the plaintiff might recover back money paid in advance on the contract, as money had and received by the town to his use.

The same principle is recognized in New York. *Utica Ins. Co.* v. *Scott*, 19 Johns. 1. *Utica Ins Co.* v. *Cadwell*, 3 Wend. 296. *Utica Ins. Co.* v. *Bloodgood*, 4 Wend. 652.

2. The evidence, offered in support of the objection that the defendant was induced to enter into the agreement of submission to arbitration by the concealment of material facts, fails to support that objection. The authority to appropriate part of the money to life memberships was given by the plaintiff to the defendant's treasurer. The defendant produced at the hearing before the arbitrators evidence of such payments by the treasurer,

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and they were allowed by the arbitrators in reduction of the five thousand dollars claimed by the plaintiff. Nor can we see that the transaction can be regarded as any evidence of a waiver of the conditions upon which the balance of the money was held.

3. As to the objections that the award exceeded the submission, and that the claim submitted was materially altered in its terms, it is sufficient to say that the evidence relied on in support of them was submitted in defence at the hearing before the arbitrators, and had the effect only to reduce the plaintiff's claim, not to increase its amount or to change its character.

4. For the purpose of showing that the award was so grossly erroneous, unjust and unwarranted by, and contrary to, the evidence, as to constitute misconduct on the part of the arbitrators, the defendant offered evidence of all the evidence heard before the arbitrators. But this evidence thus offered is not reported in the bill of exceptions. We cannot, therefore, see that the defendant suffered any injury by its rejection, and need not consider the question whether, or how far, such evidence could under any circumstances be admitted.

5. The more important objection remains to be considered. It is alleged that the plaintiff, without the knowledge of the defendant, consulted and advised with one Snow, who was afterwards selected as one of the arbitrators, while the case was under consideration between the parties, in relation to facts material to the decision, and that Snow formed and expressed an opinion in favor of the plaintiff before he was appointed arbitrator.

At the hearing, upon the motion to accept the award, in the Superior Court, Snow and the plaintiff were both witnesses; the judge found upon the evidence certain facts reported in the bill of exceptions, and ordered judgment for the plaintiff. The question, therefore, is whether, upon these findings, that judgment is erroneous in law. We are of opinion that it is not. The question is mostly one of fact. The judgment must stand, unless, upon the facts found, the award was legally invalid.

It does not appear that after the submission, or after Snow had notice that he was wanted as an arbitrator, any *ex parte* communication was made by the plaintiff to him for the purpose of influencing him in the plaintiff's favor, or prejudicing him

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against the other party. The facts found by the court, namely, that Snow and the plaintiff were familiarly acquainted and frequently visited each other's houses; that before the submission was entered into, the plaintiff had honestly stated the principal facts in the case to him; and that, upon these facts, Snow had expressed the opinion that no commercial house could stand upon such a transaction, do not compel us to the conclusion that he was, from undue bias and partiality, an unfit arbitrator upon the matter involved in the controversy. The proposition stated by him is one with reference to which few men, upon the facts in this case, would differ. The main question was as to the liability under this contract of a corporation possessed only of limited powers. The opinion that an individual or a mercantile firm with different or unlimited powers could not escape liability does not prove that Snow had so far prejudged the defendant's case as to disqualify him as an arbitrator. There is nothing to show that he acted as, or understood that he was, the agent of the plaintiff after or before he became arbitrator. His fitness is not impaired by the fact that the plaintiff admitted that he relied on him to look out for his interest. There does not appear on the part of either any fraud, collusion, false statement or perversion of the facts in the case.

It is to be considered that this was a submission under the statute by which the award of a majority is made binding; that it is not uncommon in such cases for each party to choose a neighbor and friend who is understood to have some previous knowledge of the matter in dispute, while the third man is chosen by the other two, or mutually agreed upon by the parties. There is nothing to show that these were not so chosen. Arbitrators, not avowedly selected as partisans, are indeed bound, as in the execution of a joint trust, to look impartially at the true merits of the matter submitted to their judgment; but under the circumstances here indicated, the mere previous intimacy of the parties is of little weight without some proof of misbehavior while the cause is actually pending. But, above all, it is to be considered that the judge saw as witnesses the parties charged with improper conduct; that they were the only witnesses in support of the charge; and that he had full opportunity to judge of their honesty and fairness, the age and intel-

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lectual ability of each, and the probability that one was improperly swayed in the discharge of his duty by the other.

We cannot decide, as matter of law, that he was not justified in finding as a fact that the plaintiff was not chargeable with improper conduct such as would avoid the award, and that the arbitrator was not unfitted to serve by previous prejudice and bias. *Strong* v. *Strong*, 9 Cush. 560, and 12 Cush. 135. *Fox* v. *Hazelton*, 10 Pick. 275. *Conrad* v. *Massasoit Ins. Co.* 4 Allen, 20. *Johnson* v. *Holyoke Water Power Co.* 107 Mass. 472.

Exceptions overruled.

WILLIAM ATHERTON & others *vs.* LUCIAN NEWHALL & another.

Suffolk. March 13. — Sept. 7, 1877. ENDICOTT & SOULE, JJ., absent.

An agreement to take all the leather of a certain thickness forming part of a large pile, from which it was afterwards to be selected by the seller, the receipt of part of the leather by a common carrier, not expressly authorized by the buyer to accept it, and the acceptance by the buyer of that part but with no intention to perform the whole contract, are not a sufficient acceptance to take the sale out of the statute of frauds.

CONTRACT to recover the price of 660 sides of sole leather. At the trial in the Superior Court, before *Gardner*, J., it appeared that the plaintiffs were dealers in leather in Boston, and that the defendants were manufacturers of boots and shoes in Lynn. One of the plaintiffs testified that the defendant Newhall called at their store on Saturday, November 9, 1872, examined some leather, and said he would take "what leather was adapted to his purpose," being leather "light weight" in thickness, out of a certain lot of about 800 sides which were piled up in the store; and that, after Newhall had gone, he assisted in sorting out the leather intended for the defendants, which was then rolled up into 44 rolls, containing 660 sides, weighed, marked with the defendants' names, and placed near the front door of the store, ready for delivery. It was also in evidence that in the afternoon of the same day an expressman, who was in the habit of calling at the plaintiffs' store for goods for Lynn,

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called and took six rolls of the leather, containing 90 sides, which was all his wagon could carry, with the goods then on it, but did not deliver them until the Monday following to the defendants, who were regular customers of his; but in this case no order had been given to him by either party. The plaintiffs' store with its contents, including the remaining 570 sides of leather, was burned in the great fire of November 9, 1872. On Monday, November 11, 1872, the defendant Newhall called on the plaintiffs and produced the bill, which he had received from the plaintiffs, for the 660 sides, and requested their bookkeeper to correct the bill so as to correspond with the amount of leather actually received by him, and the bookkeeper thereupon deducted the 570 sides from the bill. On March 20, 1873, he tendered to the plaintiff $394, the amount due for the 90 sides, which they declined to receive.

Upon this evidence, the judge ruled that there was no evidence of any delivery to or acceptance by the defendants of the 570 sides of leather, directed the jury to return a verdict for the price of the 90 sides, and reported the case for the consideration of this court. If the action could be maintained for the whole 660 sides, the verdict was to be set aside; otherwise, judgment was to be entered on the verdict.

E. Avery & G. M. Hobbs, for the plaintiffs.

R. M. Morse, Jr., for the defendants.

GRAY, C. J. It is unnecessary to consider whether there was a sufficient delivery to complete the sale, because it is quite clear, upon the authorities, that there was no such acceptance and receipt of part of the goods as would satisfy the statute of frauds. Gen. Sts. *c.* 105, § 5. Such acceptance must be by the buyer himself, or by some one authorized to accept in his behalf. The acts of the buyer on Saturday did not constitute such an acceptance, because, according to the seller's own testimony, the buyer merely agreed to take all the sides of leather of a certain thickness, which were not then set apart by themselves, but formed part of a large pile from which they were afterwards to be selected by the seller. *Knight* v. *Mann*, 118 Mass. 143. The receipt of part of the leather by the expressman did not constitute such an acceptance, because he was not authorized to accept so as to bind the buyer. *Johnson* v. *Cuttle*, 105 Mass. 447. The

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acceptance by the buyer on Monday, of the part brought by the expressman, was not a sufficient acceptance to take the sale of the whole out of the statute, because it appears that it was not with an intention to perform the whole contract and to assert the buyer's ownership under it, but, on the contrary, that he immediately informed the seller's clerk that he would be responsible only for the part received. *Townsend* v. *Hargraves*, 118 Mass. 325, 333. *Remick* v. *Sandford*, 120 Mass. 309.

Judgment on the verdict.

ALEXANDER W. ARMOUR & another *vs.* SETH E. PECKER & another.

Suffolk. April 4. — Sept. 7, 1877. AMES & LORD, JJ., absent.

In replevin of whiskey, brought by A. against C., there was evidence that A. sold the goods in Cincinnati to B., who did business in Boston; that, by the terms of the agreement, the whiskey was to be delivered and regauged on the cars at Cincinnati, and, on receipt of an invoice of the whiskey, B. was to send to A. at New York his promissory note for the price, on three months' time, dated at Cincinnati as of the date of the delivery on the cars there; that the whiskey was put on the cars, and an invoice and a form of a note, dated at Cincinnati, on ninety days, were sent to B.; that B. did not sign this note, but pledged the goods to C. for a valuable consideration, failed in business, and two days afterwards sent a note to A. in New York, dated at Boston, and payable three months after date; that A. replevied the whiskey in Boston on the day the note arrived in New York, and two days afterwards tendered the note to B. in Boston, who refused to receive it. *Held*, that the evidence would warrant the jury in finding that the sale was upon a condition which was broken, and that there had been no waiver of the condition; and that, if so, B. acquired no title to the goods which he could transfer to C.

The omission of a judge to observe, in his charge to the jury, upon a particular point not suggested at the trial, cannot, if no misdirection is shown, be taken advantage of under a general exception to his whole charge, although all the evidence is stated in the bill of exceptions.

GRAY, C. J. This is replevin for fifty barrels of whiskey, sold by the plaintiffs, merchants in New York, through their agent, John L. Pugh, in Cincinnati, to George Simmons, of Boston, and sold or pledged by Simmons to the defendants. At the trial in the Superior Court, the plaintiffs sought to recover upon two distinct grounds: 1st. That the sale of the whiskey by them to Simmons was upon a condition which had not been performed.

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2d. That Simmons purchased the whiskey not intending to pay for it, and that the defendants were not *bonâ fide* purchasers. The verdict was for the plaintiffs. To the instructions given to the jury upon the second ground no exception is taken, and the question is whether there was any error or omission in the instructions upon the first ground, which affords the defendants any right of exception.

Pugh, the plaintiffs' agent, testified that he sold the whiskey to Simmons in Cincinnati, to be delivered and regauged on the cars in Cincinnati, on three months' time, and that the promissory note for the price was to be dated at Cincinnati as of the date of the delivery of the goods there, and to be signed by Simmons, payable to his own order, and by him to be indorsed and sent to the plaintiffs at New York, on receipt of the bill of lading of the goods; that on March 20 he delivered the goods on the cars at Cincinnati, addressed to Simmons at Boston, and at the same time sent to Simmons, for his signature and indorsement, a form of note, dated Cincinnati, March 20, 1875, and payable to his order ninety days after date, and also sent to him the bill of lading, or, as he calls it in another part of his testimony, an invoice of the goods, together with a certificate of gauge. The document actually sent, and produced at the trial, was rather an invoice than a bill of lading; but as the words "bill of lading" and "invoice" appear to have been used by the parties to the transaction, and to have been treated at the trial as meaning the same thing, the difference is immaterial.

On March 30 and April 3 the plaintiffs wrote, and on April 6 and 7 telegraphed to Simmons, requesting him to forward the note, but received no answer. On April 7, Pugh, having been informed by the plaintiffs that they had not received the note, wrote to Simmons, requesting him to send it to them. There was evidence that the whiskey reached the railroad station in Boston on March 27, and was thence removed by Simmons to his store on April 5 or 6.

One of the plaintiffs testified that he afterwards came to Boston, and on April 12 found the goods in the defendants' possession, and replevied them; that on April 11 or 12 he received in Boston, from his house in New York, a promissory note signed by Simmons, dated Boston, March 23, and payable to his own

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order in three months, for the price of the whiskey, and an envelope addressed to his firm at New York and bearing the postmark of Boston, April 9, two days after the failure of Simmons; that on April 14 he saw Simmons in Boston, and tendered this note to him, and he declined to receive it; and that the plaintiffs had never held or used, or claimed to hold or use this note in any way or for any purpose against Simmons.

The testimony of Pugh warranted the jury in finding that the sale to Simmons was upon the condition that, on receiving the invoice or bill of lading of the goods, he should give his promissory note for the price, dated at Cincinnati, so as to make the transaction an Ohio contract, governed by the laws of the State of Ohio. If such was the contract of sale between the parties, neither Simmons, nor those claiming under him, could acquire a title which would enable them to hold the goods against the plaintiffs, without performance or waiver of the condition. *Whitney* v. *Eaton*, 15 Gray, 225. *Farlow* v. *Ellis*, 15 Gray, 229. *Hirschorn* v. *Canney*, 98 Mass. 149.

We perceive no error in the instructions given,* of which the

* The judge instructed the jury, upon the first ground upon which the plaintiffs claimed to recover, as follows: "The plaintiffs in this case claim the right to maintain their action upon two entirely independent grounds. If they have succeeded in satisfying you, upon the evidence, that they are entitled upon either ground to maintain this action, you should return a verdict for them. The first of these grounds is that the goods originally belonged to them, about which now there is no dispute; that the contract of sale was upon a condition precedent, which condition, as they say, was that the payment for these goods by the purchaser, Simmons, was to be made by his own promissory note. If that was the contract, if there was nothing more said than that he was to pay for the goods in his own promissory note, the presumption would be that payment was to be contemporaneous with the delivery of the goods, and the title to the goods did not pass to Simmons, and would not pass to him without his complying with that condition and delivering to the vendors his promissory note.

"In this case it is claimed that this sale was made in Cincinnati by Pugh, acting as the authorized agent of the plaintiffs, to the authorized agent of Simmons here in Boston, upon the condition that the note of Simmons was to be delivered, and that payment was to be made in his note; and if that was the bargain, then, although the property was billed to Simmons, and the bill of lading made out, and the goods were delivered to the common carrier in Cincinnati to be transported to Boston, and they were transported to Boston,

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defendants have any right to complain. The earlier part evidently related to what was necessary to the performance of the

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and Simmons received them here, took them into his possession, deposited them in his store, having to that extent the absolute control over them, yet, until he paid for them by delivering his note, the property remained the property of the vendor.

"If the contract was a conditional one, and the condition was not fulfilled, then it can make no difference to the present defendants, the purchasers from Simmons, that they acted in entire good faith, and that they paid for the goods. A man cannot sell what he does not own, and give a title to it; and the sale being upon a condition, if it was so, and the condition not fulfilled, the property did not belong to Simmons, and he, having no title to it, could not pass a title to it to the present defendants.

"On the 9th of April, as the evidence tended to show, Simmons made his note, inclosed it in a letter or an envelope, and sent it by mail to the plaintiffs in New York. They received it in due course of mail, and the plaintiffs in New York remailed it to one of the plaintiffs who was then in Boston. Whether the sending of this note by Simmons to the plaintiffs changed the rights of the parties depends upon the question as to whether the note was to be given concurrently with the delivery of the goods; that is, Was Simmons to give his note when the goods were received here, and were the two things to be done concurrently? If so, the goods having been received by him on or before the 6th, his sending his note on the 9th would not be a compliance with the condition. The plaintiffs declined to receive that note, as testified by the plaintiff who is here, and it was either tendered back to Simmons, or an attempt was made to tender it back, which only failed of an accomplishment because Simmons could not be fonnd. The plaintiffs say that they did not accept the note. If they had accepted the note at that time, it might have been evidence, and would have been, perhaps, conclusive evidence, that they waived the condition, if there was one, that they should receive the note upon the delivery of the goods. But the plaintiff who has testified in this case says they declined to accept the note, and that it was tendered back, and that they have never made any use of it, and do not now hold it as a note against Simmons.

"Then there is another thing in relation to this note: If it was one of the conditions of this contract that that note was to be dated in Cincinnati, so that it should be an Ohio contract and be construed by the Ohio laws, then giving a note dated in Boston, making it a Massachusetts contract, would not be a compliance with that condition. There are two reasons for this. A sale of this kind of property, the sale of which is regulated by law, may be either lawful or unlawful. If the sale is an unlawful one, made here in this state, or if it is made in another state with a view to having it sold in this state in violation of law, the contract would be an unlawful one, and could not be enforced here. If the plaintiffs stipulated that they should have a note dated at Cincinnati, Ohio, so as to make it an Ohio contract, that was a condition

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condition, and the latter part submitted to the jury the question of waiver by receiving the note sent by Simmons. The defendants now contend that the instructions precluded the jury from finding a waiver of the condition by the delivery of the goods upon the cars, or by Pugh's letter of April 7. But, it not appearing that any such point was suggested at the trial, the omission of the judge to observe upon it, no misdirection being shown, cannot be taken advantage of upon a report of the whole evidence, and under a general exception to the whole charge. *Ball* v. *Mannin*, 1 Dow & Cl. 380. *Armstrong* v. *Toler*, 11 Wheat. 258, 277. *Pennock* v. *Dialogue*, 2 Pet. 1, 15. *Chicago Unitarian Society* v. *Faulkner*, 91 U. S. 415. *Exceptions overruled.*

T. S. Dame, for the defendants.

R. D. Smith & H. M. Rogers, for the plaintiffs.

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which they had a right to make, and it is a condition which they have now a right to insist upon.

"You will determine, upon all the evidence in the case, what the contract was; and if you find that it was a conditional contract, a conditional sale, either that the note was to be delivered contemporaneously and concurrently with the delivery of the goods, or that it was to be an Ohio note, a note dated at Cincinnati, whether it was on ninety days or three months, offering a note dated here in Boston would not be a compliance with that condition; the title to the whiskey would not pass to Simmons. But if you should find that the terms of the contract allowed Simmons to pay in his note to the plaintiffs some days after this delivery of the goods, then, if he did tender such a note to them as the condition called for, the payment of the note on Monday, or the tender of the note on Monday, April 9, would be a compliance with the terms of the contract.

"You will determine, upon the evidence, what the condition of this sale was, if it was a conditional sale, and as you shall find that condition to be. If you find it was a condition precedent, then you must find, before you can hold that this property passed, that Simmons fulfilled that condition. If he did not, and the condition that he should give his note dated at Cincinnati, if such was the condition of the sale, was not waived by the plaintiffs by an acceptance of the note sent to them by Simmons as aforesaid, then he never had any title to these goods, and never having had any title to them, he could not sell them or give any title to the present defendants; and, if you so find, you will return a verdict at once for the plaintiffs, with nominal damages."

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SHOE AND LEATHER NATIONAL BANK *vs.* JOSEPH DIX & others.

Suffolk. March 16. — Sept. 14, 1877. ENDICOTT & SOULE, JJ., absent.

An instrument in the form of a promissory note, beginning, "We as trustees but not individually promise to pay," and signed "A., B. and C., trustees," purported on its face to be secured by mortgage of real estate. A., B. & C. were trustees of a land association, and purchased of the promisee a parcel of land, the deed of which ran to them as trustees of the association, and set forth their powers. They mortgaged the land to the grantor, and gave the above instrument, secured by the mortgage, in part payment of the purchase money. *Held*, in an action against the makers of the instrument, by an indorsee, who took it after maturity, that they were not personally liable thereon.

CONTRACT against the makers of the following instrument:

"February 16, 1871. $53,000. For value received, we as trustees but not individually promise to pay to the Boston Water Power Company or order, the sum of fifty-three thousand dollars in five years from this date, with interest to be paid semi-annually, at the rate of seven per centum per annum, during said term, and for such further time as said principal sum or any part thereof shall remain unpaid.

"Signed in presence of P. H. Sears. Geo. P. Sanger, Joseph Dix, R. A. Ballou, } Trustees.

"Secured by mortgage of real estate in Boston, duly stamped, to be recorded in Suffolk Registry of Deeds."

This instrument was indorsed in blank by the Boston Water Power Company.

The action was discontinued as to Ballou, because of his discharge in bankruptcy, and the assignee in bankruptcy of Dix was admitted to defend; and the case was then submitted to this court on an agreed statement of facts in substance as follows:

Prior to February 16, 1871, there existed a private association of persons who agreed to act in concert together in purchasing real estate in this and the adjacent counties. This association made the defendants, who, with other persons, were then members thereof, its trustees to effect such purchases of real estate, with powers and duties concerning the same, substantially as set

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forth in the deed hereinafter mentioned. On February 16, 1871, the association, through its said trustees, caused a purchase of property from the Boston Water Power Company to be effected, and the conveyance to be made to the defendants, "as they are trustees for the Brookline Avenue Associates as hereinafter set forth." "To have and to hold the granted premises, with all the privileges, easements and appurtenances thereto belonging, to the said Sanger, Dix and Ballou, as joint tenants and not as tenants in common, and to their heirs and assigns and to the survivor of them and his heirs and assigns forever, in trust nevertheless for the Brookline Avenue Associates for the following purposes: to take, hold, mortgage, lease, manage and improve the same according to the exercise of their best discretion, with full power in the trustees or trustee for the time being, in the exercise of such discretion, to sell at public or private sale any portion or the whole of the real estate hereby conveyed, and to make, execute and deliver good and sufficient deeds to convey the same in fee simple free from the trusts hereby created."

At the same time with the execution and delivery of the deed, a mortgage back to the Boston Water Power Company, in part payment of the purchase money, was executed by the defendants, and the note secured thereby, being the note in question, given, which in March or April, 1876, was indorsed to the plaintiff. The mortgage was never assigned to the plaintiff, having been foreclosed by sale on November 4, 1875.

If upon these facts the defendants were liable, they were to be defaulted, judgment to be ordered against the defendant Dix for a sum stated, to be proved against his estate in bankruptcy, but no execution to issue against him personally, and against the defendant Sanger; otherwise, judgment was to be ordered for the defendants.

H. D. Hyde, for the plaintiffs.

S. Bartlett & A. C. Clark, for the assignee of Dix.

P Cummings, for Sanger.

AMES, J. The question whether the defendants have made themselves personally responsible must be determined by the terms of the note itself. In determining the proper interpretation of any written contract, the court will give full effect to all the terms in which it is expressed. Those terms will not be

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modified by extrinsic evidence tending to show that the real intention of the parties was something different from what the language imports. They will be taken in their plain, ordinary and popular sense, except where it may be qualified by some special usage, or where the context evidently shows that the parties in some particular case had a different intent. It is no part of the business of the court to make or alter a contract for the parties. Even if it be found that the contract, according to its true meaning, has no legal validity, or fails to become operative, it is not for the court, in order to give it operation, to suppose a meaning which the parties have not expressed, and which it is certain they did not entertain. It must be assumed that all the language used in the contract was selected with some purpose and is to be of some effect. If a party, therefore, in a contract into which he voluntarily enters, and not in the execution of any official trust or duty, makes it an express stipulation that he is acting for somebody else, and is in no event to be personally liable, he certainly cannot be rendered so by law. Sedgwick, J., in *Sumner* v. *Williams*, 8 Mass. 162, 184. In a question as to the meaning of a contract, the want of apt words to create a personal responsibility is not to be supplied by the alteration or enlargement of its terms.

In applying these familiar and elementary rules of construction to the case now before us, we find that the defendants promised "as trustees but not individually." The construction contended for by the plaintiffs would require us to strike out the words "but not individually;" although in so doing we should not only alter the contract, but should impose upon them a liability which apparently they took special pains to avoid.

It is to be borne in mind that this was not a case of agents acting for an undisclosed or unknown principal, and is, therefore, readily distinguishable from *Winsor* v. *Griggs*, 5 Cush. 210, and cases of that class. Neither was it an attempt by the defendants to bind property over which they had no legal control. By the terms of the deed they had power to mortgage, lease and manage the property at their discretion, but for the benefit and on the account of the equitable owners, namely, the members of the Brookline Avenue Association. In this respect the case differs from *Thacher* v. *Dinsmore*, 5 Mass. 299, *Forster* v *Fuller*

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6 Mass. 58, and other cases of that class, in which a party promising "as guardian," &c., was held to have made himself personally liable.

Neither can it be said that the term "trustees" was used as "a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency." In this respect the case differs from *Tucker Manuf. Co.* v. *Fairbanks*, 98 Mass. 101. It often has happened that an agent for another person, or the treasurer of a corporation, has made himself personally responsible, by the form of words in which he has expressed himself in a written contract, when he may have intended to bind his principal only. Cases in which this question has been raised have often been before this and other courts, and the authorities have recently been collected and reviewed in several of our own decisions. See *Slawson* v. *Loring*, 5 Allen, 340; *Barlow* v. *Lee Congregational Society*, 8 Allen, 460; *Tucker Manuf. Co.* v. *Fairbanks*, *ubi supra*. But we believe no case can be found in which a promise "as trustee," &c., accompanied with an express disclaimer of personal liability, would fail to exempt him.

It is contended that if these defendants are not liable upon the contract as a note, then nobody is liable. Even if such were the fact, it would not be in the power of the court, as we have already seen, to alter the contract for the purpose of giving it validity. In deciding whether the defendants have or have not bound themselves, we need not decide whether they have or have not bound their principals. *Abbey* v. *Chase*, 6 Cush. 54. But, even if the written contract should fail of taking effect as a negotiable note, it might still be operative as an acknowledgment of unpaid debt, which the mortgage was intended to secure. It may be that this was all that the original parties intended, or supposed to be material. They may have considered the mortgage sufficient security, without the personal responsibility of the trustees.

Our conclusion therefore is that, without proof that the defendants, as trustees, have funds of the association in their hands applicable to this debt, no action can be maintained against them. No evidence to that effect having been offered, we must order *Judgment for the defendants.*

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JOHN ZEIGLER *vs.* MARCELLUS DAY.

Suffolk March 13. — Sept. 15, 1877. ENDICOTT & SOULE JJ., absent.

In an action by a laborer against his employer to recover for personal injuries caused by the falling in of the sides of a sewer in which the laborer was at the time at work, there was evidence that the employer was a contractor for the construction of the sewer; that the laborer was at work at the time of the accident under the direction of a superintendent, who had charge of the work and was admitted to be skilful and competent, and who was to receive, as compensation for his services, one half the profits; and that, for the safety of the men, it was necessary, in some dangerous places where the soil was loose, to place planks properly braced to keep the sides from falling in; and that this was not done. The plaintiff also offered to show that the system of construction was unsafe and defective. There was no evidence that the employer failed to furnish sufficient or suitable material for the construction of the safeguards, or that he was chargeable with any specific personal neglect, or knew of the cause of the accident. *Held*, that the superintendent was a fellow servant of the laborer, and that the action could not be maintained.

TORT for personal injuries occasioned to the plaintiff, by the falling in of the sides of a sewer upon which he was at work while in the employ of the defendant, who was a contractor. Trial in this court, before *Lord*, J., who reported the case for the determination of the full court on the question whether the plaintiff, upon the evidence put in and offered, should become nonsuit, or the case stand for trial. The nature of the evidence introduced and offered appears in the opinion.

G. S. Hale & W. Emery, for the plaintiff.

T. H. Sweetser & J. W. Hammond, for the defendant.

COLT, J. To maintain this action the plaintiff must show a neglect of some duty on the part of the defendant, which he owed to the plaintiff while he was employed in his service, and which was the sole cause of the injury complained of. The plaintiff alleges that there was such neglect, either in not providing sufficient security against the caving in of a trench which he was digging for the defendant, or in not notifying him of danger connected with the work, of which the defendant was aware, but of which the plaintiff was ignorant. The plaintiff's evidence is made part of the report, and the question is whether that evidence, with "offers to prove an unsafe and defective system of construction," and that the defendant was present from time to time and had knowledge of the way in which the work was progressing, should have been submitted to the jury.

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It appeared that the defendant had contracts for the construction of sewers through the streets of the city of Cambridge; that at the time of the accident the plaintiff was at work for him, digging for one of the sewers, through soil more or less sandy, under the direction of one Winning, who had charge of the work as superintendent, and whose skill and competency were admitted by the plaintiff. It did not appear that the defendant did any work himself on the sewer, or that he gave any directions to the men who were at work under Winning. For the safety of the men in the trench, it was necessary, in some dangerous places where the soil was loose, to place planks properly braced to keep the sides from falling in. The necessity for this, as well as the proper mode of applying the safeguards, was from the nature of the case left to be determined by the superintendent as the work of excavating and extending the sewer progressed. There was no evidence that the defendant failed to furnish sufficient and suitable material for the construction of the required safeguards, or that he was chargeable with any specific personal neglect, or knew of the cause of this injury. The offer of proof that the system of construction was unsafe and defective, and known to the defendant, in addition to the evidence reported, was an offer not to prove the existence of any fact inconsistent with or additional to those already in evidence, but to show that the general mode adopted was known to the defendant, and that he was therefore responsible for it.

If the negligence relied on to support the action was the neg ligence of a fellow servant while engaged in the same general business, or in a service which constituted part of the common employment, although it was a service of a higher grade, the plaintiff cannot recover. Such negligence is regarded as among the ordinary risks of the employment in which he was engaged. On the other hand, the master is bound to exercise ordinary care in the choice of servants and in supplying suitable appliances, instrumentalities or materials, for the performance of the work required. If the plaintiff suffered from the master's neglect in this respect he may recover.

We are of opinion that the evidence would not warrant a jury in charging the defendant with neglect of the latter description. The master does not insure the safety of the servant. He

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is only required to use reasonable care to provide suitable material and appliances, so that the workman may be only exposed to such risks as are ordinarily incident to the business. It is not always easy to decide whether a given injury was within the risks assumed, or was caused by the master's neglect of duty. "Whether a particular structure or appliance is one for which the master is responsible to his servant may depend upon circumstances, including the nature and scope of the employment of those engaged in its preparation and use. It may depend upon the question whether the direction and charge of the work is confided to the workmen or some of them, or retained by the employer or left unprovided for." *Arkerson* v. *Dennison*, 117 Mass. 407.

In the case at bar, the work was committed to the supervision of a skilful and competent superintendent; it required for the protection of the men the frequent use of temporary structures, the location and erection of which, as the digging progressed, was a part of the work in which the superintendent and the men under him were alike employed, and for the preparation of which, as in case of the scaffold of the mason or the carpenter, the master is not liable, unless there is something to show that he assumed it as a duty independent of the servant's employment. The occasional presence of the defendant as the work went on is not enough to charge him with this duty. *Summersell* v. *Fish*, 117 Mass. 312. *Johnson* v. *Boston*, 118 Mass. 114. *Hodgkins* v. *Eastern Railroad*, 119 Mass. 419. *O'Connor* v. *Roberts*, 120 Mass. 227. *Kelley* v. *Norcross*, 121 Mass. 508. *Harkins* v. *Standard Sugar Refinery*, 122 Mass. 400.

But the plaintiff contends that the case is taken out of these rules by the fact that the superintendent Winning was a partner or joint principal with the defendant in this work, and not a fellow servant of the plaintiff. The undisputed facts however show that he was not a partner. The agreement was that Winning should work for the defendant as superintendent, and should receive one half the profits as compensation for his work; he was to furnish no capital; he was to share no losses and to be responsible for no debts; he had no lien, no interest in the stock or materials or in the profits as profits. The parties did not understand that they were partners. *Ryder* v. *Wilcox*, 103 Mass. 24.

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Denny v. *Cabot*, 6 Met. 82. The facts disclosed do not change Winning's relation to the plaintiff as his fellow servant. In view of the plaintiff's express admission as to his skill and competency, we have not considered whether his peculiar relation to the principal was such as to disqualify him, or to charge the defendant with neglecting his duty to the plaintiff by employing him as superintendent upon such terms. *Plaintiff nonsuit.*

PATRICK CANNY *vs.* ADELINE ANDREWS.

Suffolk. March 28. — Sept. 19, 1877. AMES & LORD, JJ., absent.

A city, for the purpose of widening a street, purchased a lot of land with a building thereon, which had by prescription an easement in a chimney standing on an adjoining lot of land, took down the building, appropriated the greater part of the land to the widening of the street, allowed the rest of the land to lie vacant for six years, and then conveyed it by deed of quitclaim. *Held*, that the easement in the chimney was lost by abandonment, and did not pass to the grantee.

BILL IN EQUITY, filed December 27, 1876, to restrain the defendant from removing a chimney in which the plaintiff claimed certain easements. Upon the filing of the bill, a temporary injunction was granted. At the hearing, before *Colt*, J., the following facts were admitted by the parties:

About a hundred years ago, a block of three houses was erected on the corner of Clark Street and Hanover Street, in Boston. On September 13, 1869, the city of Boston passed an order authorizing the widening of Hanover Street, and, in pursuance of said order, purchased by deed of warranty, from Nancy Pierce, the corner lot of the block, with the building thereon, which fronted on Clark Street twenty-nine and one-half feet, and on Hanover Street seventy-two feet. On May 10, 1870, the city of Boston sold the building on the corner lot to George W. Gerrish, who proceeded at once to tear down the building, and removed all the materials constituting the same. After the sale and removal, the city of Boston appropriated to the widening of Hanover Street a strip of said corner lot of land, twenty-four feet and nine inches wide, and filled up the cellar formerly under

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the building. The removal of the building was necessary from the widening of the street. On December 26, 1876, the city of Boston sold by public auction the remaining part of the corner lot, without any building thereon, to the plaintiff, and deli-ered to him a quitclaim deed thereof on the same day, and he has since been in possession thereof. The defendant is seised of the lot and house adjoining the plaintiff's land. Before the removal of the building by Gerrish, there was no wall between the two buildings, and they were a mutual protection to each other, beams running lengthwise between the two buildings supporting the floor timbers of both houses. The beams projected, and still project, over the line of the plaintiff's estate six inches at the Clark Street end, but inclined entirely under the defendant's building at the rear end. There is a chimney covering thirty six square feet of land standing wholly in and belonging to the land of the defendant, in which there were fireplaces, and closets adjacent to the fireplaces, opening into each floor of the building removed. An easement by prescription existed to the use of the fireplaces, closets, and beams supporting the floor timbers, which now exists, unless terminated by the destruction of the building. Upon the removal of the building by Gerrish, the side of the defendant's building was laid open and left unprotected from the elements, and in such a condition that the beams and rafters which supported the floorings and roof of the defendant's building were uncovered, and the plaster and lathing, which had been the only partition between the buildings, were exposed to view, and were the only protection of the defendant's building from the inclemency of the weather. The building became untenantable, and, for its proper use and enjoyment, it became necessary to erect a suitable outside wall on the side of her building next adjoining the plaintiff's land. The defendant began to tear down the chimney and build a wall, when she was restrained by injunction.

The plaintiff contended that he had the right to rebuild on the remaining strip of land, and again use the fireplaces, closets, and beams for the support of floor timbers.

The defendant contended that the easements were coextensive with the existence of the buildings, and ended with the necessity which created them; and that, the city of Boston having caused

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the dominant tenement to be destroyed, the easements were extinguished by operation of law, and that its grantee was therefore estopped from asserting any easements therein.

The judge reserved the case for the consideration of the full court.

C. F. Donnelly, for the plaintiff.

C. D. Adams, for the defendant.

SOULE, J. The easement which the plaintiff claims was not gained by deed, but by the continuous use and enjoyment of the chimney of the defendant by the owners of the house which formerly stood in part on the premises now owned by the plaintiff. The city of Boston, the plaintiff's grantor, on May 10, 1870, sold this house as personal property, and caused it to be destroyed, not because it was falling to decay and was unsafe, but because the city wished to appropriate the greater part — about five sixths — of the land on which it stood to the widening of Hanover Street. The cellar which had been under the house was filled up, and the street was widened, as intended. This having been done, the city continued to own that part of the land not included in the street, until December 26, 1876, without erecting any building thereon. The destruction of the house by the city left the house of the defendant open and exposed to the weather, so that the erection of a wall was necessary to its safe occupation. In order to build such wall, the defendant began to destroy the chimney, but was stopped by an injunction granted in favor of the plaintiff.

It is well settled that an easement gained by prescription may be lost by abandonment, and that such abandonment may be shown by a cesser to use for even a short period, accompanied by acts of the owner of the dominant estate indicating an intention to abandon the right. *Dyer* v. *Sanford*, 9 Met. 395. *Pope* . *Devereux*, 5 Gray, 409. *The Queen* v. *Chorley*, 12 Q. B. 515. *Moore* v. *Rawson*, 3 B. & C. 332.

The unavoidable inference, from the acts of the city in respect to the matter, is that, when it removed the house and converted the larger part of the lot of land on which it had stood into a street, it abandoned al right to use the chimney of the defendant. This purpose is made still more clear by the fact that the remaining part of the lot was permitted to lie vacant during a

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series of years. The easement, therefore, was extinguished by operation of law, while the premises were owned by the city, and did not pass to the plaintiff, as appurtenant to the land, by the quitclaim deed under which he holds. The defendant, in taking down the chimney and building a wall to protect her house, rendered unfit for occupation by the act of the city, the plaintiff's grantor, was exercising a right of ownership in a proper manner, and was not invading any right of the plaintiff.

Bill dismissed.

LYDIA T. HASTINGS *vs.* DEMING J. HASTINGS & another.
DEMING J. HASTINGS & another *vs.* LYDIA T. HASTINGS.

Suffolk. March 28, 29. — Sept. 19, 1877. AMES & LORD, JJ., absent.

A testator by his will devised an estate to his daughter A. for life, with remainder in fee to such children as should be living at the time of her decease. A. had three children, B., C. and D., of whom B. died in her lifetime, leaving two children. Thereupon in A.'s lifetime D. and C. executed and delivered an agreement, without consideration, to the mother of B.'s children, which recited the devise under the will, and that B.'s children might thereby be excluded from participation in the estate, and their belief that it was the testator's intention that the estate should be equally distributed among A.'s descendants, and stated that they renounced any and all claim to the portion of the estate "which would have belonged to B. had he lived, in favor of his children and their heirs forever, confirming it to them, and will defend the rights of said children and their heirs" to the estate against every claimant under the testator's will, so that they could hold it as fully as if B. had survived A. The agreement also recited that the children of D. and C. might be placed in the same position as B.'s children, and stated that they confirmed to each other's children the proportion of the estate in the same manner as if they with B. had survived A. Subsequently the children of B. died unmarried, without issue and intestate, in the lifetime of A., whom D. and C. survived. *Held*, that B., C. and D. took a contingent remainder in the estate, and that, under the agreement, D. and C. undertook, in case they and any child or children of B. survived A., to convey to such child or children an undivided third part of the estate in fee; and that by the death of B.'s children the agreement, together with the covenant to defend, became of no effect.

THE FIRST CASE was a bill in equity, filed February 24, 1876, against Deming Jarves Hastings and Sally Ann Dwight, for specific performance of the following agreement, under seal, executed and delivered by them to Lydia T. Hastings:

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"Know all men by these presents that we the undersigned, Deming Jarves Hastings, son of Sally Hastings and grandson of the late John Jarves of Boston, and John Dwight and Sally Ann Dwight, his wife, daughter of Sally Hastings and granddaughter of said John Jarves, all three of us of or late of the town of Medway, county of Norfolk and State of Massachusetts, have entered into the following agreement which witnesseth, viz.:

"That whereas by the last will and testament of John Jarves late of Boston, county of Suffolk and state aforementioned, dated March 26th A. D. 1819, and duly proved and allowed at a Probate Court for said county of Suffolk on the 8th September, 1823, the real estate belonging to him situated on the easterly side of Newbury Street in said Boston was bequeathed to Deming Jarves and his heirs to hold in trust for Sally Hastings, and at her death then in trust for the children of said Sally Hastings who shall be living at the time of her decease and their heirs forever, in fee simple, they to take and hold the same as tenants in common. And whereas the aforementioned will of said John Jarves may be so interpreted as to exclude the children of the late Samuel Jarves Hastings (who was also a son of said Sally Hastings and grandson of said John Jarves) from participation in the aforesaid Newbury Street estate, and whereas it is our sincere belief that the said John Jarves never intended to exclude any of the descendants of said Sally Hastings from participation in said property, but on the contrary he did intend a just and equal distribution of said property amongst the descendants of said Sally Hastings:

"Therefore, in consideration of the foregoing, and the further consideration of the sum of ten dollars paid to each of us by Lydia T. Hastings, guardian of the children of the late Samuel Jarves Hastings aforementioned, the receipt whereof is hereby acknowledged, we have renounced, and do by these presents renounce for ourselves and our heirs forever, any and all claim which we have or might have by any construction of the aforesaid will to the portion of the aforesaid estate, which would have belonged to said Samuel Jarves Hastings had he lived, in favor of his children and their heirs forever, confirming it to them, and will defend the rights of said children and their heirs to the aforementioned property against all and every other claimant

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under the said John Jarves, so that they can take possession and hold the same as fully and completely as though their father had survived the said Sally Hastings:

"And furthermore, as it may so happen that the children of either of us, the said Deming Jarves Hastings and John Dwight and Sally Ann Dwight his wife, may be placed in the same position as that now held by the children of the late Samuel Jarves Hastings: We now by these presents, each to the other, do bind ourselves and our heirs forever to waive any right to a greater portion of the before mentioned estate, which might accrue in consequence of the death of either of us, than would fall to us should we survive the aforesaid Sally Hastings, but to confirm to the children of each of us the proportion of said estate in the same manner as though we altogether with the said Samuel Jarves Hastings had survived the said Sally Hastings.

"In confirmation of the foregoing agreement we hereunto set our hands and seals this the twenty-ninth day of June, A. D. 1852."

THE SECOND CASE was a bill in equity, filed March 4, 1876, to reform the above agreement.

The two cases were heard together before *Morton*, J., on motions for issues to be framed for a jury, and the following facts appeared:

In 1823, John Jarves of Boston died, and his will, dated March 26, 1819, contained, besides other provisions not material to be stated, the following: "I give and devise to my son Deming Jarves and his heirs my real estate on the easterly side of Newbury Street in said Boston, to hold to him and them, in trust to permit, suffer and sufficiently authorize and empower my daughter Sally Hastings and her assigns to have, receive and take the rents and issues thereof to her and their own sole and separate use and benefit during her natural life," "and from and immediately after the decease of my said daughter, then in trust for all and every the child and children of said Sally Hastings who shall be living at the time of her decease, and their heirs forever in fee simple, they to take and hold the same as tenants in common. All the rest and residue of my estate I give, devise and bequeath unto my son Deming Jarves, be the same real, personal or mixed, to have and to hold the same to him his heirs and assigns forever."

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At the death of John Jarves, Sally Hastings and three children of hers, namely, Deming Jarves Hastings, Sally Ann Hastings, now Sally Ann Dwight, and Samuel Jarves Hastings, husband of Lydia T. Hastings, were living. On June 26, 1849, Samuel Jarves Hastings died, leaving two children by Lydia T. Hastings surviving, namely, Samuel Jarves Hastings, Jr., and Catharine Hastings. At the death of Samuel Jarves Hastings, there were living three children of Deming Jarves Hastings, and six children of Sally Ann Dwight, by her husband, John Dwight, now deceased. At the time the agreement was executed, on June 29, 1852, all these children of the parties were living.

On December 21, 1858, Samuel Jarves Hastings, Jr., died, and on December 19, 1861, Catharine Hastings died, both being unmarried, without issue and intestate. On November 28, 1875, Sally Hastings died, leaving Deming Jarves Hastings and Sally Ann Dwight, her only children surviving. Thereupon Lydia T. Hastings requested Deming Jarves Hastings and Sally Ann Dwight to convey and confirm to her one undivided third part of the estate devised by the will of John Jarves to Sally Hastings for life, which they refused to do.

Deming Jarves Hastings and Sally Ann Dwight contended that the agreement was made in its present form by mistake and did not express the agreement or carry out the intention of the parties at the time it was made; and that it was a voluntary agreement without consideration. It was admitted that they received no pecuniary consideration from Lydia T. Hastings, either personally or as guardian.

The judge reserved the case, upon the question as to the construction of the agreement, for the consideration of the full court. If the construction was as contended by Deming Jarves Hastings and Sally Ann Dwight, both bills were to be dismissed; otherwise, both cases were to stand for further hearing.

C. A. Welch, for Lydia T. Hastings.

J. H. Benton, Jr., for Deming Jarves Hastings and Sally Ann Dwight.

SOULE, J. By the will of John Jarves, the defendants in the first case, Deming J. Hastings and Sally Ann Dwight, and their

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brother, Samuel Jarves Hastings, took a contingent remainder in the land in question; the contingency being that they should survive Sally Hastings. If they all survived her, they were each to have one undivided third part in fee. If two survived, each would have an undivided half. If one only survived, he or she would have the whole. If neither survived, the land would go to Deming Jarves in fee. It was uncertain, therefore, whether either of them would have any estate in the land, and, if any, whether it would be in the whole or in an undivided part. The will, however, gave to each a contingent remainder in the whole. By the death of Samuel Jarves Hastings, the relation of his surviving brother and sister to the land was unchanged, except that it was made certain that, if they both survived Sally Hastings, each would have an undivided half of the land.

It was in this condition of the matter that the agreement was made on which the plaintiff rests her claim. The deceased brother had left two children who clearly had no rights under the will of John Jarves. The death of either of the defendants, during the life of Sally Hastings, would leave his or her children without any interest in the land, or any rights under the will. The agreement recites that it is made in consideration of the belief that it was the intention of the testator that the land in question should be equally distributed among the descendants of Sally Hastings.

The only question in the suit is as to the construction of this agreement. It is inartificially drawn, and obscurely expressed. If the language were clear, the instrument would be construed in accordance with the meaning ordinarily given to the terms employed, even though such construction should not consist with the intention indicated in that part which precedes and introduces the agreement itself. As, however, there is difficulty in finding the meaning of the parties if we limit the investigation to that part of the instrument in which the contract lies, we must interpret it with such assistance as we can derive from the circumstances in which it was made, as set forth in the recital in the instrument itself, and in the facts stated in the report.

It is contended by the plaintiff that the agreement is, in effect, an equitable assignment of a remainder of the fee, after the es-

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tate for the life of Sally Hastings, in one third part of the land, to the children of Samuel Jarves Hastings, and that the covenant to defend the rights of the children and their heirs to the property estops the defendants to claim title in opposition to Lydia T. Hastings, the mother and heir at law of those children. In other words, the claim is that the defendants, having only a remainder contingent on their surviving Sally Hastings, released one third of the land to those children, and agreed to defend the title to that third to them and their heirs, against all others claiming under John Jarves. There being no consideration, pecuniary or meritorious, for the making of such a grant or the assumption of such a liability, and the legal effect of the instrument, if so construed, being quite different from the purpose set forth in its recitals, it will not be so construed, unless a different construction would violate some principle or established rule. This construction presupposes an intention on the part of the defendants to warrant to the children of their deceased brother an estate which was not yet theirs, and which it was by no means certain that they would ever have. There is nothing in the facts stated in the report, or in the recitals of the instrument, which indicates such intention. On the contrary, the instrument shows an intention merely to put the children in as good a relation to the inheritance as their father would have been in, and to leave the children of the respective defendants in an equally good relation to the inheritance, in case of the death of either defendant. The construction contended for by the plaintiff would not carry this intention into effect, but would place the defendants under an obligation to convey one third of the land away from the descendants of Sally Hastings, through the instrument which is made for the sole purpose of dividing the land equally and justly among her descendants.

The error involved in this construction is in supposing that the words which state the subject matter of the renunciation or release to be "the portion of the aforesaid estate which would have belonged to said Samuel Jarves Hastings had he lived" mean "had he outlived Sally Hastings." Such is not the natural nor the obvious meaning. The defendants, for the express purpose of putting the children of their deceased brother on an exact equality with themselves, so far as they can, with refer

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ence to the estate in question, attempt to give to the children an assurance and covenant that, as against them, the defendants will not reap any advantage from the death of their father, but will permit them to stand in their father's place. To this end they say, "We renounce all claim which we have [now] in the portion which would have belonged to Samuel Jarves Hastings if he had lived" [till now]. As has already been said, the form of expression is not accurate nor precise for the purpose for which it is employed. The portion which the deceased brother would have had in the estate, if he had been living when the agreement was made, would have been a remainder contingent on his outliving Sally Hastings. He having died, the defendants could not properly be said to have any claim on that portion of the estate — that remainder contingent on his outliving one who had already outlived him. While he lived, they each had a contingent remainder in the whole, liable, if all survived Sally, to result in an estate in fee in an undivided third. After his death, they had each a contingent remainder in the whole, which would, if both survived Sally, result in a fee in an undivided half. That was the only change effected by his death, in their relation to the land.

The whole instrument is to be considered in determining the construction to be given to it; and, in view of the recitals which it contains of the state of the title under the will, of the situation of the children of Samuel by reason of his death, of the belief of the defendants as to the testator's purpose, and of the intention of the defendants as to the children of Samuel and as to their respective children, we think the meaning of the agreement to be that, in case any child or children of Samuel Jarves Hastings should survive Sally Hastings, the defendants, if they survived said Sally, would not avail themselves of the right given by the will to hold the fee to the exclusion of such child or children, but would convey to such child or children one undivided third part of said land in fee. If, then, we assume the agreement to be a deed of quitclaim of the premises thus described — that is, of a contingent remainder, in one third of the land, contingent on the defendants surviving Sally Hastings, and on some child of Samuel Jarves Hastings surviving her, the agreement, so far as the children are concerned, became a nullity, because

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no one of them survived the said Sally; the contingency did not occur.

The covenant to defend the "property" is merely a covenant to defend the premises released; and since these were not the land, but only a contingent remainder in the land, which failed by reason of the death of the releasees, their heir at law, the plaintiff, cannot maintain any suit thereon. It is familiar law that the covenant to defend cannot enlarge the premises conveyed or released.

The construction of the agreement being as contended by the defendants in the first suit, both bills must, under the provisions of the report, be dismissed. *Bills dismissed.*

ROBERT D. EVANS & another *vs.* CHARLES M. CLAPP.

Suffolk. March 24, 1876. — Sept. 27, 1877. LORD & SOULE, JJ., absent.

An agreement of dissolution of a partnership existing between A., B. and C. provided that A. should continue the business, paying B. and C. for their respective interests; that matters in dispute should be referred to arbitrators; and for an account of stock. This account was taken and certain goods, supposed to belong to a third party, were not included. In a subsequent dispute between A., B. and C. and this third party, a referee, to whom the matter was submitted, decided that a large portion of the goods in question belonged to the late firm. On a bill in equity brought by B. and C. to compel A. to account and to pay them their respective interests in these goods, the answer of A. alleged that he had paid them according to the account taken at the dissolution and that all matters in dispute had been submitted to the arbitrators as provided, whose report was conclusive. The master, to whom the case was sent, found that the goods in question were not included in the original account, because they were supposed to belong to the third party, and that this matter was not submitted to the arbitrators. *Held*, that the account was not conclusive, and that B. and C. might show that the goods in question were the property of the firm; that the award of the arbitrators was not a bar to the suit; that A. could not prove under his answer that he was ready and willing to refer the claim to the arbitrators named in the articles; and that the award and testimony of the referee, that the ownership of the goods in question was in dispute before him and that he decided that they belonged to the firm, was admissible.

BILL IN EQUITY, filed December 1, 1873, by Robert D. Evans and Levi Ladd against Charles M. Clapp for the settlement of the affairs of a partnership. Hearing upon the pleadings, a

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master's report and exceptions thereto, before *Endicott*, J., who reserved the case for the consideration of the full court The facts appear in the opinion.

W. A. Field, for the plaintiffs.

A. A. Ranney, for the defendant.

ENDICOTT, J. The facts and questions presented upon this record are numerous and complicated, and may be more readily understood by reducing them to order and indicating those we consider material and important to the decision.

The parties to this bill were partners dealing in rubber goods, having in their store a stock of goods of their own, and also goods consigned to them for sale by the National Rubber Company. The partnership was dissolved by articles of dissolution on October 1, 1872. The defendant was to continue the business with its good will, and the articles provided, among other things, that he should take the stock of goods on hand belonging to the firm and allow and pay the plaintiffs therefor in the settlement according to their respective interests. An inventory of stock on hand on October 1, 1872, was taken, and it was supposed that 14,136 pairs of boots and shoes then in the store were the property of the rubber company, and they were not included in the inventory. The articles also provided that matters in dispute between the partners should be determined by certain arbitrators named therein. There were several matters in dispute upon which the arbitrators passed, but the master has found that the questions arising in this case were not submitted to or passed upon by them.

The defendant, after October 1, 1872, carried on the business alone, and in the great fire of November 9, 1872, the bulk of his goods, including such of the 14,136 pairs of boots and shoes as then remained unsold, were destroyed. A controversy then arose between the plaintiffs and the defendant on the one side, as members of the dissolved firm, and the rubber company on the other, in regard to the settlement of their accounts; in which an important question in dispute was, who owned the 14,136 pairs of boots and shoes on October 1, 1872; the rubber company insisting that they belonged to the firm, and the members of the firm, that they were the property of the company. Being unable to agree, they entered into a submission in writing of all demands

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between them to a referee. At the hearing before him the firm presented a detailed statement of their account with a balance of about $41,000 due them. The account consisted of charges for advances made on goods consigned to them by the company, with credits for goods sold or assumed and taken by the firm. The chief matter in dispute was the ownership of the 14,136 pairs of boots and shoes, which the firm did not credit to the company in their account, as the company contended should be done. The referee admitted the claim of the rubber company, to the extent of 9977 pairs, finding that number in fact to belong to the firm, and as a necessary result credited the company with that number in the account. He also found that certain goods charged to the rubber company as "reconsigned" and "recharged" goods should also be credited to the company. His award was in general terms in favor of the firm in the sum of $19,904 without further detail, and was settled by the parties on that basis.

The plaintiffs thereupon bring this bill, which, among other things, in substance alleges that the defendant refuses to account for a large quantity of goods in the store on October 1, 1872, of which he took possession under the articles of dissolution, and which were considered by both parties at that time to belong to the rubber company, but which in fact belonged to the firm, and for which the defendant was bound to account and to pay the plaintiffs for their respective interests therein. The answer admits that the defendant took all the goods belonging to the firm on October 1, 1872, but denies that there were any goods taken by him, then considered to be the property of the rubber company, which in fact belonged to the firm. It then alleges that, at the time of the dissolution, an account of all the goods belonging to the firm was taken by the plaintiffs and assented to by the defendant, and that he has paid them according to the account; and the answer also alleges that all the matters in dispute have been submitted to arbitrators under the articles of dissolution, and their report is conclusive.

It may be convenient in this connection to dispose of some of the questions raised and argued by the defendant.

It is contended that it was not competent for the master to go behind the determination of the parties when they made the

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inventory. But the master has found that it was then supposed that the 14,136 pairs of boots and shoes belonged to the rubber company, and for that reason they were not included. The plaintiffs are not debarred, therefore, from showing that they were the property of the firm. It was a case of mutual mistake, and there is nothing in the articles of dissolution which makes an inventory binding or conclusive.

The defendant also contends that the plaintiffs cannot maintain this suit, by reason of the provision for a reference in the articles of dissolution. It is sufficient to say, in reply to this, that no such question is open on the answer. The allegation of the answer is in substance that all matters in dispute were referred to arbitrators. This is an entirely different question, and the master has found that the questions here raised were not submitted to the arbitrators or passed upon by them. Their award, therefore, is not a bar to this demand. *Edwards* v. *Stevens*, 1 Allen, 315. 1 Dan. Ch. Pract. (4th Am. ed.) 670. See *Wood* v. *Humphrey*, 114 Mass. 185. Nor was it competent for the defendant to prove that he was ready and willing to refer this claim to the arbitrators named in the articles. The issue not being raised in the answer, that the agreement to refer precluded the plaintiffs from maintaining this bill, whether the defendant was ready and willing to refer was immaterial.

There were other matters set forth in the bill and answer, which were settled by the parties pending the hearing before the master; and the only question left for the master to decide was the claim against the defendant arising out of the adjustment of the affairs of the firm with the rubber company.

The plaintiffs offered in evidence before the master, on the question who owned the 14,136 pairs of boots and shoes, and as to the goods described as "recharged" and "reconsigned" to the company, the award of the referee, and also his testimony to prove that the ownership of these boots and shoes was in dispute before him, and that he admitted the claim of the rubber company to the extent that 9977 pairs belonged to the firm on October 1, 1872. Independent evidence was also offered by the plaintiffs on these questions. The defendant objected to the evidence of the submission to and award of the referee in the controversy with the rubber company, and to his testimony re-

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specting the 14,136 pairs of boots and shoes on hand on October 1, 1872. The master makes two findings upon this part of the case: one based upon the award and the testimony of the referee; and the second upon the other evidence before him. Assuming the award and the evidence of the referee to be competent and conclusive, he finds that 9977 pairs, and the reconsigned and recharged goods, belonged to the firm; and, if not competent, then upon other evidence he finds that a portion of the 14,136 pairs belonged to the firm, but that "it is not possible to ascertain at this time the exact quantity," and he is unable to do so; but as the best approximation to accuracy under the circumstances he finds that this quantity would amount to 3,600 pairs, and that the "recharged and reconsigned goods" belonged to the firm, and he also finds the value to be $1.58 per pair. It is to be observed that, laying aside the award, the master has found on other evidence as to the recharged goods and as to the value per pair of the goods on hand on October 1, 1872, belonging to the firm. The only question, therefore, is whether the award and the testimony of the referee, that the ownership of the goods was in dispute before him and that he admitted the claim of the rubber company to the extent that 9977 pairs belonged to the firm, was competent, and the testimony of the referee as to other matters becomes immaterial.

The first question that arises is, would the award and the testimony of the referee have been competent in a subsequent suit between these parties and the rubber company, in which the title to these goods was in dispute.

The award of a referee, after a full hearing, and acquiesced in by the parties, is binding and conclusive upon all matters submitted to him. It often becomes necessary, in determining what questions are concluded by the award, or whether the award is in itself binding upon the parties, to show by parol evidence what took place before the referee, what was in controversy before him, and what matters entered into his decision. The referee is a competent witness himself to establish these facts. *Martin* v. *Thornton*, 4 Esp. 180. *Strong* v. *Strong*, 9 Cush. 560, 576, and cases cited. *Blakely* v. *Graham*, 111 Mass. 8. *Scott* v. *Perley*, 98 Mass. 511. *Wood* v. *Willis*, 110 Mass. 454. *In re Dare Valley Railway*, L. R. 6 Eq. 429, 435. But parol evidence

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is not admissible to vary or control a written award, and there are numerous decisions showing in what cases such evidence is incompetent, and in which a referee is precluded from testifying. *Wiswall* v. *Hall*, Quincy, 27. *Withington* v. *Warren*, 10 Met. 431, 433. *Clark* v. *Burt*, 4 Cush. 396, 399. *Leavitt* v. *Comer*, 5 Cush. 129. *Ward* v. *Gould*, 5 Pick. 291. See 2 Greenl. Ev. § 78.

In a recent case in England, heard before the Court of Exchequer, the Exchequer Chamber and the House of Lords, this question is very fully and elaborately considered. *Buccleuch* v. *Metropolitan Board of Works*, L. R. 3 Ex. 306; L. R. 5 Ex. 221; L. R. 5 H. L. 418, 457, 462. The case arose upon a claim made by the plaintiff for damages to his property by reason of an embankment constructed by public authority along the River Thames, and was referred to an arbitrator, who was called as a witness by the defendants for the purpose of showing that he exceeded his authority. All the judges gave opinions in the course of the proceedings. The Lord Chancellor, in giving the final judgment in the House of Lords, remarked: "The umpire being a competent witness, the only question is, to what extent the defendants were entitled to examine him as to the particulars of his award. They had an undoubted right to know from him whether in his estimate of the compensation he took into consideration any matters not included in the reference, and therefore not within his jurisdiction. To prevent the defendants from questioning him so far would have been to deprive them of information to which they were entitled, by shutting them off from the only source of it, in the breast of the umpire. He alone could tell what subjects he included under the general terms of his award. But this having been ascertained, the defendants were not at liberty to go farther, and to ask the umpire what were the elements which entered into his consideration in determining the quantum of compensation. Within the limits of the reference, the amount to be awarded was entirely within the discretion and judgment of the umpire." And, in concurring with the Lord Chancellor in the result, Lord Cairns said: "It appears to me that, upon every point which may be considered to be a matter of fact with reference to the making of the award, the evidence of the arbitrator or umpire was properly admissible.

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He was properly asked what had been the course which the argument before him had taken — what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found on the face of the written instrument."

Two cases have come under our notice which bear directly on the question presented in this case. In *Zeigler* v. *Zeigler*, 2 S. & R. 286, the plaintiff brought an action to recover compensation for repairing a saw-mill on the premises of the defendant. The defendant pleaded an award of arbitrators, and a judgment thereon in a former suit between the same parties. At the trial, the defendant offered the record of the former suit, which was an action of covenant founded on an agreement by the plaintiff to sell the defendant a tract of land on which the saw-mill was erected. It was referred to arbitrators, who awarded in general terms that the plaintiff should give to the defendant a deed of the premises. The record and the award were admitted in evidence, and the arbitrators were allowed to testify that the dispute relative to the claim for repairing the saw-mill had been decided by them, the plaintiff having brought it forward and demanded compensation. The plaintiff had acquiesced in the award, and the court held that he was bound by it, and that when a party brings forward a claim, and, in the usual course of proceedings, such claim is not entered on the record, it becomes necessary to prove it by parol evidence, which was the best that the nature of the case admitted, and that the law of evidence adapts itself to the nature of the case. In *Buck* v. *Spofford*, 35 Maine, 526, the award directed the conveyance of certain land, and the referees were allowed to testify that, before them, the plaintiff claimed a right to three sixteenths of a township, and that they decided that he was entitled to but three twentieths.

Suppose, in the case at bar, after the rendition of the award and the settlement of the parties according to its terms, the rubber company had brought trover, or, if the boots and shoes

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had been in existence, replevin for them against the firm or this defendant, in whose possession they were. The face of the award discloses no decision on the question of title, which had been already decided. It would clearly have been competent for the referee to testify, on the production of the award, that the question of title to these boots and shoes was in dispute before him, that he had decided that the boots and shoes or a portion of them belonged to the firm, that his decision on that question entered into his award, and that he allowed the value of a certain portion of them as a credit to the account of the company. In other words, the referee may testify to the proceedings before him, and that the question sought to be tried in the new suit was settled and determined by arbitration.

Nor can there be any doubt that the result of the award is also binding on the plaintiffs and defendant. It not only concluded the rights of the firm, as against the rubber company, but as between themselves and in view of the contract of dissolution. The award did not change the title to the property; it merely ascertained it. *Thorpe* v. *Eyre*, 1 A. & E. 926.

If an award is made against a firm, and it is paid by one partner, upon the question of contribution by the others, the amount of the award is conclusive. They cannot dispute that the amount paid was not really due from the firm. The question before the referee was, to whom the boots and shoes belonged; if to the company, his award would have been larger; as he found they belonged to the firm, the award was smaller by deducting their value. As, by the articles of dissolution, these boots and shoes, found to belong to the firm, passed to the defendant, to be paid for by him, he cannot be permitted to try the question of title again, when, by a failure of evidence, the parties may not be able to establish the fact. If he can succeed in throwing out the finding of the referee, upon which the rights of the firm against the rubber company, and the title in these particular boots and shoes, was established, he may get them without paying for them. And, while the plaintiffs have suffered in the award by having to credit these shoes to the account of the firm against the company, they may suffer in this case, unless they can show by the award that they did in fact belong to the company. This would be a most inequitable result, and would prevent the plain-

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tiffs from arriving at a just settlement of their respective interests under the articles of dissolution.

This conclusion renders it unnecessary to consider whether the master should have reported the evidence in regard to the amount of goods on hand on October 1, 1872. And no reason is shown why the claim for reconsigned and recharged goods should not have been allowed.

We therefore decide that the award was competent, and that it was also competent to show that the question whether the firm or the company owned the rubber goods was in controversy before the referee, and that he decided that a certain number of them belonged to the firm. How far the further evidence given by the referee was competent, it is unnecessary to inquire, as the master finds by other evidence the value per pair of the boots and shoes, and as to the recharged and reconsigned goods.

The plaintiffs are entitled to a decree that the defendant shall pay to them, in their respective proportions for the 9977 pairs of boots and shoes, at $1.58 per pair, and for the recharged and reconsigned goods. *Decree accordingly.*

JAMES L. MARMAUD *vs.* JAMES P. MELLEDGE & others.

Suffolk. March 13, 1876. — Sept. 29, 1877. AMES, MORTON & SOULE, JJ., absent.

If an insurer refuses to accept an abandonment of a stranded vessel, but takes possession for the purpose of getting her off, repairing and restoring her to the owner, and, in good faith and with reasonable diligence, proceeds to make what he deems full repairs, at a cost less than half her value when repaired, after making the usual deductions, and tenders her in this condition to her owner, who refuses to receive her, but makes no objection to the sufficiency of the repairs, and points out no deficiencies, there is no acceptance of the abandonment, and no constructive total loss of the vessel, although it afterwards appears that the repairs were not fully made.

A vessel was chartered to proceed to a certain port "with all convenient speed," and there take a cargo on board and transport it to another port. Her owner effected insurance on the freight. The vessel, while on her way to the port of lading, was stranded and abandoned to her underwriters, and an abandonment was also made to the underwriters on the freight. The underwriters on the vessel got her off, repaired her at a cost less than half her value, and tendered her to the owner, who

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refused to receive her. After the abandonment, the owner refused to have any thing to do with the vessel, and wrote to the charterer that the vessel was a wreck and in the hands of the underwriters, and that he could not proceed as per charter party. *Held*, that, there being no total loss of the vessel, and the owner having voluntarily abandoned the charter party, he was not entitled to recover the insurance on freight.

TORT for wrongfully cancelling and surrendering a policy of insurance on freight of the brig Rosetta. At the trial in this court, before *Ames*, J., the jury returned a verdict for the defendants; and the plaintiff alleged exceptions, the material parts of which appear in the opinion.

W. S. Macfarlane, for the plaintiff.

C. T. Russell, for the defendants.

ENDICOTT, J. The plaintiff was the equitable owner of this vessel. He had made a bill of sale of her to his brother, who was the master. There was no consideration for the sale, but it was made to enable the master to sell her if an opportunity should offer; and the master gave back a declaration of trust, binding himself to account to the plaintiff for the proceeds in case of sale. It was ruled at the trial that the plaintiff could maintain the action, and no question is before us touching the correctness of this ruling. As the record title stood in the master, who held it for the benefit of the plaintiff, all his acts and declarations in connection with the vessel must be taken to have the same force and effect as if done or made by the plaintiff himself.

The vessel was stranded on the east point of Prince Edward's Island on July 10, 1865, while on her voyage from Boston to Richibucto, whither she was bound, to take on board a cargo of deals for England, under a charter party which had been executed by the master and the charterer, who resided in New Brunswick, and which required the vessel to proceed there "with all convenient speed." The plaintiff was on board at the time. Upon the freight to be earned on this cargo, the insurance had been obtained by the defendants in their own name for the benefit of the plaintiff, which is the principal subject matter of this controversy. The plaintiff had no insurance on the vessel, but the mortgagee, to whom she had been mortgaged by him for nearly her whole value, had insurance upon the vessel in several offices in Pictou. How far and in what manner

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the plaintiff was interested in that insurance the record does not disclose.

It is stated in the bill of exceptions that the master, after an unsuccessful attempt to get the vessel off, noted a protest which he afterwards extended, and called a survey. The report of the surveyors condemned her, and recommended a sale, which was notified to take place on July 18, 1865. Notice of this was given to the mortgagees, and, before the day appointed for the sale, the agent of the underwriters at Pictou arrived with instructions to get the vessel off if possible. The sale did not take place, and the master gave written notice of abandonment to the agent, and sent a similar notice to the underwriters at Pictou. In the last notice, he says: "I do not wish to oppose your desire to get the Rosetta afloat again, but the said vessel is now entirely in your own hands, likewise risks and consequences." The underwriters refused to accept the abandonment, and the agent succeeded in getting her off, and took her into Pictou, some thirty or forty miles distant, on July 23, 1865, for repairs. The insurers at Pictou soon after notified the master that they were repairing the vessel, and requested him to come to Pictou, inspect their doings and see to her fitting out, to which the master replied that he had abandoned to them, and had no further concern in the matter. On August 21, 1865, the underwriters wrote to the master that the vessel was thoroughly repaired, ready for sea, and lying in Pictou harbor in a perfectly seaworthy state, at his disposal. They also informed him that if the mortgagees, to whom they had given notice of her position, should proceed to sell her under their mortgage, they, as insurers, could offer no objection, as the settlement of the mortgagees' claim was a duty devolving on the owners, and not on the underwriters. This letter was duly received within a few days, but no reply was made to it, and neither the master nor the plaintiff went to Pictou. Nor does it appear that the plaintiff or the master had any communication with the mortgagees. On August 30, 1865, the mortgagees took possession of her, and, after a formal sale for the purpose of foreclosure, she was sold by them for $7900, and has been in constant use since, principally as a collier, but occasionally making voyages to the West Indies. The expense of raising and repairing her did not exceed $1200, much less than

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half her value, which appears to have been estimated at more than $8000.

While the vessel was aground at Prince Edward's Island, the master sent his protest to the defendants by mail, which was received. The plaintiff afterwards notified them of the abandonment, that the underwriters were refitting her, and stated that, "should they tender me the vessel when repaired, I will not take her back." He also requested the defendants to demand the insurance on the charter party. To this letter a reply was sent, that the insurance office declined to pay, as the underwriters at Pictou were repairing the vessel. On August 18, 1865, and before the conclusion of the repairs, the master wrote to the agent of the party who had chartered the vessel, that the vessel was stranded on July 10, 1865, and became a total wreck; that he had abandoned her to the underwriters, who had got her afloat and taken her to Pictou; and he states that he "cannot proceed as per charter party between you and the owners."

Upon the facts here stated there is no dispute. No claim is made that the underwriters did not act in good faith in taking possession of and repairing the vessel, or that they did not make what they considered to be substantial repair and restoration, putting her in as good a condition as she was before. And it is conceded that there was no evidence at the trial that the work of repair was delayed, or was not prosecuted and finished within a reasonable time and with proper dispatch.

We are of opinion that, upon these facts, the presiding judge might properly have ruled that there was no constructive total loss of the ship, but only a partial loss.

When a vessel is stranded or submerged, there is not necessarily a total loss, for she may be got off or raised, and the damage may be small. An abandonment of her under such circumstances by the owner is not binding on the insurers, nor are they concluded by the report of a survey condemning her and recommending her sale. They may take possession of her, raise and repair her, when the owner refuses or declines; and, if they can do this for less than half her value, they may return her to the owner, and thus avoid payment of a total loss. This must be done expeditiously, and within a reasonable time; for, if they neglect their duty in this regard, they cannot return the ship,

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and must be presumed to have taken her under the abandonment. This has been settled in numerous cases in this Commonwealth. *Wood* v. *Lincoln & Kennebeck Ins. Co.* 6 Mass. 479. *Peele* v. *Suffolk Ins. Co.* 7 Pick. 254. *Commonwealth Ins. Co.* v. *Chase*, 20 Pick. 142. See also *Hall* v. *Franklin Ins. Co.* 9 Pick. 466; *Sewall* v. *United States Ins. Co.* 11 Pick. 90. In *Commonwealth Ins. Co.* v. *Chase*, it was said by the court "that this right on the part of the underwriter, to act for the preservation of the property insured, is one of great importance. It works well for the cause of truth and justice. It proceeds upon the principle of indemnity, on which the law of insurance rests." The insurers, to whom the Rosetta had been abandoned, could properly take her and make the experiment, and upon its result the validity of the abandonment depended. If they in all respects performed their duty, and the expense of raising and repairing did not exceed half her value, it was a partial loss, and the abandonment was invalid; if they did not, there was a constructive total loss, and the abandonment was effectual. What happened afterwards must determine the question. The subsequent acts of the parties, including the underwriters, the plaintiff and the mortgagees have been fully detailed, and we think the case falls clearly within the rule laid down by Chief Justice Shaw in *Reynolds* v. *Ocean Ins. Co.* 22 Pick. 191, "that if the underwriters, after having refused to accept the abandonment, took possession of the vessel, for the actual and declared purpose of getting her off, repairing and restoring her to the assured, and in good faith intended and with reasonable diligence proceeded to make full and complete repairs, and in good faith, according to their intent, did make what they considered and believed to be a substantial repair and restoration of the vessel to as good a condition as she was in before, and in this state tendered her to her owners, it was a substantial performance of their contract, and the assured were bound to accept her; that if, at the time of such tender, the assured made no objection to the sufficiency or completeness of the repairs, nor pointed out any deficiency, the tender should be deemed good, although it might be discovered afterwards that there were deficiencies in the repairs." This rule, of course, applies only to those cases where the expenses would not amount to fifty per cent., deducting one third new for old, and making

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other usual and proper deductions. If the underwriters have conducted themselves in the manner pointed out, and within a reasonable time tendered the vessel to the assured, who makes no objection to the sufficiency of the repairs, and points out no deficiencies, he is bound to accept her, and the underwriters cannot be treated as having accepted the abandonment. Whether the assured accepts or not, the question is settled that there is no constructive total loss of the ship.

If it should afterwards appear that there are deficiencies in the repair, the acceptance of the vessel does not preclude the assured from claiming further damage, and, according to the principles of the contract securing to the assured an indemnity, an action might be brought, after such acceptance, to recover for any such deficiency or unrepaired damage, as a partial loss. The rights of the assured are thus fully protected. He must act in good faith. If he does not and cannot point out deficiencies and call the attention of the underwriters to them, so that they may be supplied, he must take the ship, and, if they prove to be insufficient, he may recover for an additional partial loss. And, if the deficiencies should prove to be such as the plaintiff now claims to exist in this particular ship, he might recover her full value. He cannot, when the underwriters have done their whole duty, lie by silent and inactive, take no notice of the tender, or refuse to have anything to do with the ship because he abandoned her when she stranded, and then recover from the underwriters as for a total loss on proving that the repairs were insufficient. To allow him to do so would be to defeat and make utterly worthless the privilege of the underwriters to raise and repair the ship for the benefit of all concerned, and to demonstrate, as it is their right to demonstrate, that the claim made upon them is unfounded, and that the abandonment was unnecessary.

Nor is the rule laid down open to the objection, urged by the plaintiff at the argument, that it cannot be reconciled with the doctrine that, unless the underwriters make thorough repairs, they accept the abandonment. The chief justice fully disposes of that question, in *Reynolds* v. *Ocean Ins. Co.*, *ubi supra*, when he says, in speaking of the duty of the underwriters, that if they did "not in good faith and with reasonable diligence proceed to

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make a full and complete repair and reëquipment of the vessel, or if, at the time of the offer to restore the vessel as fully repaired and equipped, the assured pointed out deficiencies which actually existed, and the underwriters refused or unreasonably neglected to supply these deficiencies, and complete the repair and equipment, then the assured were not bound by the tender; and as the underwriters, after the offer to abandon, had taken the vessel into their possession, for the avowed purpose of repairing, but had not made such repair, they must be considered as having made her their own, and as having accepted the abandonment, and then the assured would be entitled to recover for a total loss. After such a recovery, by force of the abandonment, and by such acceptance of the abandonment as established by the judgment, the vessel would remain the property of the underwriters." It is said in the argument that this case is in conflict with other authorities, but we do not so regard it, and see no reason for departing from the rule laid down and acted on in this Commonwealth for nearly forty years. See *Paddock* v. *Commercial Ins. Co.* 104 Mass. 521, 534. In *Copelin* v. *Insurance Co.* 9 Wall. 461, which is relied on by the plaintiff, the decision was on the ground that there was an unreasonable delay in repairing, and does not touch the question here presented.

No element is wanting in the case at bar to bring it within all the qualifications mentioned in *Reynolds* v. *Ocean Ins. Co.* There was no unnecessary delay; there is no claim that the underwriters did not act in good faith; no objection to the sufficiency of the repairs was made or pointed out at the time of the tender, and no question is raised that deficiencies appeared afterwards. That question, indeed, cannot arise on the facts here presented. The plaintiff assumed throughout the proceedings, and so contends in his argument, that his right to recover for a total loss of freight, on the ground of a total loss of the ship, was fixed by his abandonment at the time of the stranding. Acting upon this erroneous assumption, he steadily refused to take any notice of the repairs, or to admit that he had anything to do with the ship; and, although he and the master were on board at the time of the stranding, and were afterwards not far distant from Pictou, it does not appear that either of them visited or saw the vessel after she went to Pictou.

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If we regard the plaintiff as having the same rights that he would have had, if the insurance had been on his interest as owner and not on the mortgagee's interest, (and certainly he has no greater rights,) he cannot, upon the facts disclosed, set up that there has been a constructive total loss of the ship.

If, on the other hand, having no insurance on the ship, all the rights that he had were under the contract of insurance between the underwriters to whom he had abandoned the ship, and the mortgagees who held the mortgage given by him, then the acceptance of the ship and her sale by the mortgagees, they not making any objection to the repairs, and he failing to make any adjustment of their claim, preclude him, and he cannot assert there was a constructive total loss any more than the mortgagees can. He had full notice from the underwriters that they could interpose no obstacle to the mortgagees taking the ship, and no claim is made that the action of the mortgagees was not perfectly regular in form and in accordance with their rights.

We are therefore of opinion that there was no total loss of freight because of an actual or constructive total loss of the ship; and we fail to find in the cases previously cited, or in those mainly relied on by the plaintiff, anything in conflict with this conclusion. See *Jackson* v. *Union Ins. Co.* L. R. 8 C. P. 572; *S. C.* L. R. 10 C. P. 125; *Rankin* v. *Potter*, L. R. 6 H. L. 83, 98; *M'Gaw* v. *Ocean Ins. Co.* 23 Pick. 405, 409; *Thwing* v. *Washington Ins. Co.* 10 Gray, 443, 455; *Coolidge* v. *Gloucester Ins. Co.* 15 Mass. 341, 345.

There having been no total loss of the vessel, the only further question that can arise would be, whether by reason of the delay caused by the peril of the sea, and the time employed in making the necessary repairs, the vessel was unable to reach Richibucto in season to carry the cargo in accordance with the charter party. That she was able to reach Richibucto is evident from the fact that she has ever since been engaged in sea voyages, so that the only question would be whether she would be able to get there and obtain the cargo. We have great doubt whether this question is open to the plaintiff on the pleadings. The action was tried, so far as this branch of the case is concerned, upon the amendments to the declaration, included in the fourth and seventh counts for wrongfully cancelling and surrendering the policy of

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insurance, which, at the plaintiff's request and for his benefit and in their own names, the defendants had procured on the freight from Richibucto to England. It is alleged in the fourth count that the ship "was totally lost and destroyed by the perils of the sea whereby the freight was totally lost to the plaintiff;" and in the seventh count that, "while proceeding on said voyage said vessel was so wrecked, injured, and destroyed by the perils of the sea as to be incapable of performing the same so as to earn the freight insured by said policy, whereby said freight was totally lost to the plaintiff." Both counts proceed upon the ground that the ship was either totally lost, or was utterly incapable of proceeding as a ship to Richibucto. There is no claim for damages, distinctly set forth, on the ground that she was so delayed by the perils of the sea and consequent repair, that she could not reach her port in season to earn the freight. But it does not appear that this question was raised or considered at the trial, and we are not inclined to decide this portion of the case on that ground, as we are clearly of the opinion that the plaintiff by his acts and declarations voluntarily abandoned his charter party on the ground of a total loss of the ship and on that ground alone; and relieved the charterer from any obligation of putting the cargo on board as provided in the charter party. Throughout the proceedings he refused to have anything to do with the ship after she was stranded. He so states in his letter to the defendants of July 29, 1865; and in that of August 10, 1865, he says, "should they tender me the vessel when repaired, I shall not take her back." He acted throughout in accordance with this resolution. The ship not being lost, he was bound to proceed and execute his charter party. The time taken in extricating and repairing the ship, made necessary by reason of perils of the sea, was not so long as necessarily and as matter of law to absolve the charterer from his obligation. But, without making any attempt to execute it, he wrote on August 19, 1865, to the agent of the charterer, who had entered into the charter party on behalf of his principal, that the vessel went ashore and became a total wreck, that she was in the hands of the underwriters, and that he "cannot proceed as per charter party between you and the owners." This was sent before the completion of the repairs, and before the tender and subsequent

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proceedings, which established the fact, binding on the plaintiff, that the abandonment was ineffectual and that there was no total loss. The charterer was therefore no longer bound to furnish him with the stipulated cargo, and would have been justified in shipping it by another vessel. The plaintiff having done this, he was not entitled to go to the jury and recover damages on the ground that, by reason of the delay, the charterer was free and no longer bound to perform the requirements of the charter party. From that duty the plaintiff had absolved him, by declaring that he was himself unable to have his vessel there.

It is conceded by the plaintiff to have been proved, if admissible, that if the vessel had proceeded to Richibucto any time in August or September, she could have obtained the like freight with that described in the charter party, upon as favorable or more favorable terms. But in our view of the case we have not thought it necessary to consider the admissibility of the evidence, or to determine whether the whole right and interest of the plaintiff rested on the particular charter party, or whether he was bound to proceed and obtain another cargo if that failed him. For the same reason, we have not placed any stress upon or considered the competency of the testimony of the charterer himself, introduced in reply to the evidence of the plaintiff on this point, that he would have furnished the cargo under the charter party any time up to the middle of November.

Upon the facts disclosed on the bill of exceptions about which there is no dispute, the presiding judge would have been justified in ruling that the plaintiff was not entitled to a verdict. It is therefore unnecessary to consider the exceptions or the criticisms to the charge of the presiding judge in submitting the case to the jury. *Exceptions overruled*

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WILLIAM C. WIGHT *vs.* BARNSTABLE SAVINGS BANK.

Middlesex. Jan. 11. — Sept. 5, 1877. MORTON, ENDICOTT & SOULE, JJ., absent.

If the owner of a mill holds it in fee simple at the time of the institution of a complaint for flowing land, under the Gen. Sts. c. 149, and mortgages it pending the proceedings, a levy and sale on execution, issued on a judgment recovered on such complaint, which describe the interest taken and sold as an equity of redemption, pass no title.

WRIT OF ENTRY, dated July 17, 1875, to recover possession of a mill in Holliston, with the water privilege and land required for its use. Plea, *nul disseisin.*

The case was submitted to the Superior Court, and, after judgment for the tenant, to this court, on appeal, on an agreed statement of facts, the substance of which appears in the opinion.

H. E. Fales, for the demandant.

J. M. Day, for the tenant.

COLT, J. Both parties in this case claim title under Henry H. Packer; the tenant, by mortgage of February 24, 1872, under a power contained in which the land was sold on May 28, 1874; and the demandant, by a sale on an execution issued on a judgment recovered for past damages on a complaint for the flowing of land by this same mill. The complaint was instituted on May 24, 1869. Judgment was recovered on June 19, 1873, on an award for past damages, by which was also ascertained what sum would be reasonable for future annual damages, and what in gross for the right of using the dam forever. Execution was issued for the past damages on July 19, 1873, and a levy was made on the same day, which after many adjournments was completed on May 27, 1874, by a sale to the demandant of an equity of redemption, which only, according to the officer's return, Packer had in the premises at the time of the institution of the original complaint. The execution was returned satisfied by the sale.

It is contended by the demandant, that a lien upon the demanded premises for the amount of his judgment for past damages is created by the mill act, and that this lien he has a right to enforce under a levy made within thirty days after judgment,

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in the manner provided for the sale on execution of rights to redeem mortgaged real estate. Gen. Sts. *c.* 149, §§ 18, 20, 24–27.

It is not now necessary to pass upon the validity of this claim, for, assuming that the construction of the statute contended for by the demandant is the true construction, yet it is plain that the levy of the execution upon "the premises so subject to the lien," must correctly describe the judgment debtor's interest in the estate taken.

It is agreed that in 1869, at the time when the original complaint was instituted, Packer, the respondent therein, was the owner in fee of the demanded premises; and yet the officer declares, in his return on the execution, that he seized and sold to the demandant all the right in equity of redeeming certain mortgaged real estate which Packer had on May 24, 1869, the time of instituting the original complaint. It does not distinctly appear in the return whether the sale on execution was for the purpose of enforcing a lien, or only to satisfy the execution by an ordinary levy on property attached. If it was the latter, then the difficulty is, that on the day above named there was no mortgage on the premises and no equity which could be taken. The mortgage, under which the tenant claims, was given after that time and before the levy of the execution, and the tenant's title is now good if the sale is to be considered subject to that mortgage; and besides there is no provision of law by which the property may be attached upon a complaint under the mill act. *Capen* v. *Doty*, 13 Allen, 262. *Grover* v. *Flye*, 5 Allen, 543. *Gardner* v. *Barnes*, 106 Mass. 505.

If the sale was of premises subject to the lien, for the purpose of enforcing it, then it was a sale of an equity which did not exist at the time when it is claimed the lien attached, and is therefore void. The statute provides that the execution may be levied on the premises subject to the lien, and that the officer may proceed to sell the same or so much of the same as is necessary to satisfy the execution and all charges of levying it. He is not required to sell more of the estate than is necessary, but he must sell such estate as is subject to the lien. If it be an absolute estate in fee simple, he cannot sell an equity of redemption which did not exist and to which the lien did not attach. Gen. Sts. *c.* 149, § 26.

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The lien, therefore, under which the demandant claims, if there was any in his favor, was not perfected by a valid sale on execution, and the tenant's title remains unaffected by it.

Judgment for the tenant.

HARRIET B. PARKER & another *vs.* ELIJAH F. TAINTER.

Middlesex. March 28. — September 8, 1877.

If A. builds upon land in the possession of B., as lessee, in consideration of an agreement by B. to give him a sub-lease of it, which the lessee refuses to fulfil, he can maintain an action against B. for the cost of the building, although the agreement for the sub-lease is within the statute of frauds.

CONTRACT. At the trial in the Superior Court, before *Brigham*, C. J., the plaintiffs proved the following agreement, signed by the defendant:

"Newton, Mass., November 21st, 1873. Whereas I have agreed with Harriet B. and Sarah E. Parker to lease them a piece of land between Union Hall Building and Alfred Howe's new building on Centre Street, Newton, and whereas there have been some objections to putting up a building on said land, and in order that the said Parker sisters may be protected in putting up the building, and be saved from any loss in the matter, I do hereby agree to protect them in the matter, or to pay all costs of the building and take it off their hands should anything arise whereby I cannot give them a lease for the purpose of erecting the said building as per agreement."

It appeared in evidence that the defendant was in possession of the land mentioned in the agreement and of adjoining premises, and had been in such possession since April, 1872, and claimed under a lease thereof for a term of ten years from that date; that soon after the date of the agreement, the plaintiffs completed the erection of a building on the land, and were in the peaceable and undisturbed occupation of the land and building from December 1, 1873, until some time in May, 1874; and that in April, 1874, the plaintiffs paid to the defendant $50 for the use of the land for four months, from December 1, 1873, to April 1, 1874, at the rent of $12.50 for each month.

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It was also in evidence that a large building adjoining the land, and portions of which were held by the defendant under his lease, was, on January 14, 1874, destroyed by fire; that the owners of all the land, including that on which the plaintiffs' building stood, and also the land under the large building, contended that by the destruction of this building the rights of both the plaintiffs and the defendant had been determined, and, on February 4, 1874, notified both the plaintiffs and the defendant in writing to remove therefrom, and also notified the plaintiffs to remove their building, but nothing was done as to the plaintiffs until some time in May, 1874, when the owners took down and removed the plaintiffs' building.

The defendant never made any written lease of the land to the plaintiffs, and there was no agreement in writing between the parties, other than that above set forth; but the judge, against the objection of the defendant, allowed the plaintiffs to testify that the defendant had, prior to the making of the written agreement, orally agreed to lease to them the land mentioned in the agreement, for the term of eight years.

The defendant contended that the agreement was not sufficient to support this action; that the facts did not show any breach thereof; and also relied upon the statute of frauds.

The judge ruled that the statute of frauds was not applicable, and that, as the foregoing facts were not in dispute, the jury would be warranted in returning a verdict for the plaintiffs for the cost of their building, with interest from the date of the writ. The jury returned a verdict for the plaintiffs; and the judge reported the case for the determination of this court.

If the admission of the oral evidence and the rulings of the judge were correct, judgment was to be entered on the verdict; if, in the absence of such oral agreement, the plaintiffs were entitled to hold the verdict, judgment was to be entered thereon; but, if they were entitled to recover only nominal damages, they were to have judgment accordingly; otherwise, judgment was to be entered for the defendant.

C. Robinson, Jr., for the defendant.

B. E. Perry, for the plaintiffs.

GRAY, C. J. The plaintiffs properly admit that the writing signed by the defendant, reciting that he had agreed to lease the

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land to them, is not a sufficient memorandum of an agreement for a lease, to satisfy the statute of frauds, because it does not state the term or duration of the lease, and that defect cannot be supplied by parol evidence. *Riley* v. *Farnsworth*, 116 Mass. 223. And we need not consider whether the alternative agreement of the defendant to pay to the plaintiffs the cost of the building, if he should be prevented from giving them a lease, could be considered as an independent promise, of itself sufficient to support an action.

The defendant had an estate, though not an absolute title in fee, in the land. If the plaintiffs, in consideration of an agreement which was within the statute of frauds, and which the defendant declined to carry out, expended money in building upon his land, they might maintain an action to recover the cost of such building. *Kidder* v. *Hunt*, 1 Pick. 328. *White* v. *Wieland*, 109 Mass. 291. *Dix* v. *Marcy*, 116 Mass. 416. The evidence (laying aside the parol evidence objected to) would support such an action, the declaration was not objected to in point of form, the report shows that it was intended to present the case for decision upon its merits, and the verdict must, under the instructions given to the jury, have been for the cost of the building. By the terms of the report the plaintiffs are therefore entitled to *Judgment on the verdict.*

INHABITANTS OF TRURO *vs.* RICHARD R. FREEMAN.

Barnstable. March 22. — Sept. 8, 1877. LORD & SOULE, JJ., absent.

A tenant in a writ of entry, who pleads the general issue of *nul disseisin*, and upon the same paper, "and, in addition to said plea, sets forth the following ground of defence," to wit, nontenure, sufficiently complies with the rule of the Superior Court requiring nontenure to be presented in a specification of defence at the time of filing the plea.

Under a specification of nontenure, a tenant in a writ of entry may show that he has only a reversionary interest in the demanded premises, and that he is not in occupation of and has no right of present possession to them, but that they are in the lawful occupation of another who has a homestead right therein.

If a witness testifies, without objection, as to the valuation which the assessors of a town had put upon a parcel of land, it is within the discretion of the judge to allow the party calling the witness to put in the assessors' valuation, for the purpose of correcting the testimony of the witness.

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WRIT OF ENTRY to recover a parcel of land in Truro. The tenant filed the following: "And now comes said Freeman and defends his right, and says he did not disseise the said inhabitants of the town of Truro, in manner and form as they in said writ and declaration have supposed, and of this he puts himself upon his country. And, in addition to said plea, the said Freeman sets forth the following ground of defence: that he is not and was not, at date of said writ, nor at any time thereafter, tenant of the demanded premises, as of freehold, nor in any possession thereof."

At the trial in the Superior Court, before *Gardner*, J., the demandant introduced in evidence a deed dated June 10, 1872, from the collector of taxes to the demandant, reciting that taxes were assessed upon the demanded premises to one Atkins, as resident owner thereof, and that for non-payment of the same the premises were purchased, at a sale thereof, by the collector on behalf of the demandant under the St. of 1862, *c.* 183; and also introduced in evidence, to show the tenant's title to the demanded premises, a quitclaim deed of the same to him, dated December 30, 1868, from the assignee in bankruptcy of Atkins. It did not appear that either the demandant or tenant had been at any time in actual possession of the premises.

The tenant introduced evidence tending to show that Atkins claimed and was entitled to an estate of homestead in the demanded premises and an adjoining parcel; that Atkins had owned and occupied the premises, as a residence, for many years prior to a declaration of homestead therein, made in April, 1868, by him, and duly recorded; that the two parcels were together of less value than $800; that subsequently Atkins became a bankrupt; and that he with his family had been in exclusive possession and occupation of the premises long prior to the date of the tenant's deed and up to the present time. Atkins testified as follows: "I have owned the premises fifty years, I built the house on them forty-eight years ago. Freeman never occupied the premises. I claim to hold the premises under my homestead title against all persons."

This evidence was uncontradicted, but was objected to by the demandant, as inadmissible under the pleadings, but the judge admitted the same.

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Atkins, as a witness for the tenant, testified, without objection, to show the value of the premises, that the assessors had assessed the premises claimed as a homestead upon a valuation of over $900, after which the judge, against the demandant's objection, permitted the tenant to put in the valuation of the assessors, which tended to show that they had not assessed the premises for over $900, but for a less amount. This evidence was admitted for the sole purpose of explaining the testimony of Atkins, and not for the purpose of showing the value of the premises, and the jury were carefully instructed not to consider this evidence as bearing upon the question of value.

The jury found specially that the homestead right of Atkins included the demanded premises, and that the two parcels were together worth less than $800.

The judge directed the jury to return a verdict for the tenant; and reported the case for the determination of this court. If the demandant could maintain this action against the tenant, the verdict was to be set aside; otherwise, judgment on the verdict.

J. M. Day, for the demandant.

I. Knowles, Jr., for the tenant.

AMES, J. Since the abolition of special pleading in this Commonwealth, if the tenant in a writ of entry, instead of putting in issue the demandant's title, chooses to defend himself upon the ground of nontenure or disclaimer, he may plead the general issue of *nul disseisin*, and accompany his plea with a specification of his real ground of defence. Gen. Sts. *c.* 129, § 15; *c.* 134, § 12. In this case, the specification purports to be a part of the plea, and is incorporated with it, instead of being expressed upon a separate paper, and filed separately; but this peculiarity does not affect the substance of the allegation. It is still a plea of the general issue, accompanied with a specification, within the meaning of the 45th Rule of the Superior Court.*

It was allowable under this plea and specification to show that he tenant had only a reversionary interest in the estate, was not

* "In all real actions, where the tenant relies on disclaimer, nontenure, or any other defence, which, under the rules of common law, could not be shown under the general issue, he shall present the same in a specification of defence at the time of filing his plea."

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in the occupation of it, and had no right of present possession, but that, on the other hand, Atkins was lawfully occupying under a homestead right, the entire premises being worth less than the statutory limit of that right. If such were the fact, the action cannot be maintained against the tenant. *Martin* v. *Graves*, 5 Allen, 601. *Kerley* v. *Kerley*, 13 Allen, 286. *Hall* v. *Whiston*, 5 Allen, 126.

Testimony as to the assessors' valuation of the property having been received without objection, it was within the discretion of the presiding judge to allow the tenant, for the purpose of explaining and correcting the testimony of his own witness, to show what that valuation really was, by the record itself. The effect of this evidence was carefully limited to this purpose of explanation. As the jury were distinctly instructed not to consider it as bearing on the question of value, we must presume that the value was adequately proved by other evidence.

The parties may consider the expediency of applying to the court below to order the verdict and judgment to be entered in such a form as to clearly show what issue has been actually tried and decided. *Judgment on the verdict.*

JOHN Z. GOODRICH *vs.* CHARLES HULBERT & another.

Berkshire. September 11, 1877. ENDICOTT & LORD, JJ., absent.

It is no ground for setting aside an award of an arbitrator, that he had formerly been counsel, in another action, for the party in whose favor he found, although this fact was not known or communicated to the party against whom the award was made, or to his counsel, in the absence of evidence that the fact was intentionally concealed.

CONTRACT. In May, 1876, the case was referred by agreement of parties, under a rule of court, to Henry W. Paine, esquire, who made an award in favor of the plaintiff; and the defendants moved to set aside the award for the following reasons:

"1. Because the referee was not entirely disinterested, but, having been associated with Elias Merwin, esquire, for several

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years, as counsel for Goodrich, the plaintiff in this action, in a very important and bitterly contested lawsuit, in which said Goodrich's character was involved, was thereby necessarily biased in his favor, and unable to decide with absolute impartiality, whether said Goodrich's testimony, on which his case before the referee mainly rested, was true or false.

"2. Because the defendants were not informed that the referee had acted as counsel for the plaintiff, and consented to his appointment, because they were informed and believed that the referee had never been connected in any way with the plaintiff, and did not discover the connection which had existed between them till after the award was made."

At the hearing on this motion, *Colt*, J., found the following facts: "On June 22, 1866, one Winthrop W. Chenery brought an action against John Z. Goodrich, the plaintiff in this action, to recover damages for an alleged false and malicious libel, published by Goodrich concerning him. Goodrich retained Mr. Merwin as his counsel in that action, by whom the case was argued on demurrer before the full court, and subsequently, the case coming on for trial in the year 1870, Mr Paine was retained as senior counsel by Goodrich, at the suggestion of Mr. Merwin, and as such conducted the trial of the case before a jury, and afterwards argued it in the spring of 1871, on exceptions taken by the defendant at the trial. One of the questions presented to the jury was, whether the statements contained in the libel complained of were true, or made in good faith, and the trial excited much personal feeling in the parties. The case was settled by agreement of the parties in September, 1871, and after that date the referee had not acted as counsel for Goodrich in any matter, or had any personal relation with him. These facts were not known to the defendants or their counsel when they agreed to the appointment of Mr. Paine as referee. The defendants' counsel testified that, if these facts had been known to them, they would not have advised, nor would the defendants have consented to, his appointment. The defendants' counsel, before signing the agreement for the reference, asked Mr. Merwin, (who was the counsel of Goodrich in this case, and who assisted in the trial before the referee,) whether Mr. Paine was connected with or interested in Goodrich as counsel or other-

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wise, and was informed that he was not, from which the defendants' counsel inferred that the referee never had acted as counsel for Goodrich, and so stated to the defendants, and the defendants consented to the reference upon this understanding. Neither the defendants, nor their counsel, had any notice or knowledge that the referee had acted as counsel for Goodrich until after the award was made, when the defendants discovered it by accident. Goodrich was a material witness for himself before the referee in the trial of this case. The defendants did not contend that Mr. Merwin intended to mislead the defendants' counsel in regard to the relation which had existed between the referee and Goodrich, or that he intentionally concealed it from them, or that the referee was chargeable with improper conduct in the hearing before him, or was conscious of any bias or prejudice in the case."

The judge ruled that it did not necessarily follow, from the fact that the referee had acted as counsel for the plaintiff in the case and under the circumstances above stated, that he was so far biased in favor of the plaintiff as to render his award invalid; and, as there was no evidence to show that the referee was biased, found as a fact that he was not. The judge ruled that no cause was shown for setting aside the award, and accepted it. The defendants alleged exceptions.

M. Wilcox, for the defendants.

H. L. Dawes, for the plaintiff, was not called upon.

GRAY, C. J. The only ground assigned for the defendants' motion to set aside the award was bias and interest of the arbitrator, by reason of his having acted as counsel for the plaintiff in a former action, which was not disclosed or known to the defendants or their counsel until after the award was made. It was not contended that the fact was intentionally concealed, it did not appear that the plaintiff or his counsel knew or suspected that the defendants were ignorant of it, and their actual ignorance of the fact is immaterial. The decision of the judge, overruling the motion, is not subject to revision by the full court as to matters of fact. To hold, as matter of law, that a member of the bar is disqualified to act as an arbitrator, merely because he has formerly been of counsel for one of the parties, would be an imputation upon the uprightness and good faith of the pro-

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fession. The twenty-ninth article of the Declaration of Rights, declaring "the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit," if interpreted as contended by the learned counsel for the defendants, would prevent a judge from sitting in every case to which a former client of his in any other case was a party.

Exceptions overruled.

MICHAEL KENNEDY *vs.* EDWARD A. LANGDON.

Berkshire. September 12, 1877. ENDICOTT & LORD, JJ., absent.

By the Gen. Sts. c. 115, § 7, no exception lies to a judgment of the Superior Court sustaining a motion to dismiss an action for want of proper service of the writ.

REPLEVIN. In the Superior Court, on appeal, the defendant filed a motion to dismiss the action, on the ground, among others not material to be stated, that there had been no legal service of the writ upon the defendant. *Bacon*, J., sustained the motion on all the grounds assigned; and the plaintiff alleged exceptions.

J. Branning, for the plaintiff.

A. J. Waterman, for the defendant, was not called upon.

BY THE COURT. One ground of the judgment of the Superior Court, sustaining the motion to dismiss the action, was the insufficiency of the service of the writ. Its decision upon that ground was final, and not a subject of exception. Gen. Sts. c. 115, § 7. *Smith* v. *Dexter*, 121 Mass. 597. We need not therefore consider the other grounds assigned.

Exceptions overruled

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GEORGE S. BAKER *vs.* CHARLES H. WILLIS.

Berkshire. Sept. 12. — 21, 1877. ENDICOTT & LORD, JJ., absent.

A cornet of a debtor, who is both a musician and a tinner, and who obtains his support by playing upon his cornet and by working at his trade, is, under the Gen. Sts. c. 133, § 32, *cl.* 5, exempt from attachment, if the value of the cornet and his tinner's tools is less than one hundred dollars.

TORT for the conversion of a cornet attached by the defendant, a deputy sheriff, on a writ against the plaintiff, dated August 21, 1875.

At the trial by jury in the District Court of Southern Berkshire, the plaintiff testified that he was a tinner by trade and had worked at the business for twenty-eight years, and still worked at it; that he earned about $15 a week by such trade; that he was also a musician, and had worked at that business about fifteen years; and that he always gave a preference to the business of a musician. Another witness testified that the plaintiff worked for him as a tinner and that he also worked at the business of a musician, when he had opportunity. The plaintiff had owned the cornet about three months prior to the attachment, and in that time had played on it about fifteen times and had earned some money. When he played on the cornet he earned on an average about $5 a night. He played for balls, parties, and wherever he had an opportunity. The value of his tinner's tools was not over $25, and the value of the cornet was $25, and these were all the tools the plaintiff owned in both kinds of business.

The defendant contended upon the evidence that the plaintiff was not entitled to recover; and asked the judge to rule that "a cornet of a debtor whose business is that of a tinner, and who earns his living principally by such business, is liable to attachment, although he occasionally earns small sums with such cornet;" but the judge declined so to rule, and instructed the jury that if they found that the plaintiff, although a tinner by trade and working principally at that trade, earned money as a musician with his cornet, that was a separate business and trade, and such cornet was one of his tools in trade, and would be exempt from attachment, provided that such cornet, together with his tinner's tools, did not exceed $100 in value.

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The jury returned a verdict for the plaintiff; and the defendant alleged exceptions. In the Superior Court the exceptions were overruled; and the defendant appealed.

H. J. Dunham, for the defendant.

H. C. Joyner, for the plaintiff.

AMES, J. The obvious design and effect of the law exempting from attachment a debtor's tools and implements of trade, necessary for carrying on his trade or business, and not exceeding one hundred dollars in value, were to secure to handicraftsmen the means by which they are accustomed to earn their livelihood in their respective employments. Gen. Sts. *c.* 133, § 32, *cl.* 5. *Howard* v. *Williams*, 2 Pick. 80. It has been decided that a mechanic does not lose the benefit of this exemption by a temporary suspension of his trade, provided it is with the intention of returning to it when opportunity should offer. *Caswell* v. *Keith*, 12 Gray, 351. It has also been decided that the occupation of a musician is within the meaning of the statute, and that a portable musical instrument used by him in that business is exempt from liability to attachment or seizure on execution. *Goddard* v. *Chaffee*, 2 Allen, 395.

It is true that in *Howard* v. *Williams* a doubt is intimated as to the mode of applying this statutory exemption in the case of a debtor having two distinct trades. And in *Goddard* v. *Chaffee* some importance seems to be attached to the fact that the debtor had no other occupation or employment than that of a musician. But it is well remarked by Mr. Justice Merrick in the latter case, that the word "business," as used in the statute, is "of large signification, and denotes the employment or occupation in which a person is engaged to procure a living." There are some kinds of business, such as ice-cutting and gardening, which can only be carried on during part of the year, leaving the remainder of the time without regular employment. It may also happen, from a general stagnation of business, or from accidental causes, that an artisan may find his usual business insufficiently remunerative for his support. In such cases, the law will not discourage the debtor from the occasional exercise of any other trade or business in which he has skill to supply the deficiency in his earnings. There is nothing in the statute restricting the term "business" inflexibly to a single business.

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In *Eager* v. *Taylor*, 9 Allen, 156, it was held that *cl.* 6 of the Gen. Sts. *c.* 133, § 32, in which the exemption of materials and stock necessary for carrying on the debtor's trade or business is provided for, does not strictly limit the exemption to what is commonly pursued as a single trade. See *Pierce* v. *Gray*, 7 Gray, 67. It is difficult to see why a different rule of construction should be applied to the exemption of tools and implements. It may be necessary to the subsistence of a mechanic in a country town that he should have more than one kind of business. All danger of abuse arising from this liberal construction of the statute is fully guarded against by the moderate amount in money to which the exemption is limited.

Exceptions overruled.

GREENFIELD SAVINGS BANK *vs.* CYRUS A. STOWELL & others.

Franklin. Sept. 20, 1876. — Sept. 5, 1877. COLT, MORTON & SOULE, JJ., absent.

The alteration of a promissory note by one of the makers, by increasing the amount for which it was made, by the insertion of words and figures in blank spaces left in the printed form on which it was written, avoids the note as to such makers as do not consent thereto, even in the hands of a *bonâ fide* holder for a valuable consideration.

CONTRACT against Cyrus A. Stowell, Timothy D. Richardson and Charles Stowell, upon the following promissory note, in which the words in Roman letters were printed, and those in italics written, and purporting to be signed by the defendants, and by George W. Bardwell, whose name appeared first among the signers:

"$ *467.* Greenfield, Mass. *Sept. 29th*, 1874.

"For value received, *I* promise to pay the Greenfield Savings Bank, or order, *four hundred and sixty-seven* dollars, on demand, with interest at the rate of *seven* $\frac{3}{10}$ per centum per annum, payable semiannually on the first days of June and December of each year."

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Cyrus A. Stowell and Richardson alone appeared, and filed several answers, each containing a general denial. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, on agreed facts in substance as follows:

George W. Bardwell obtained from the plaintiff a printed blank form of a promissory note, such as the bank was accustomed to use. He then wrote in the figures "67" at the top of the note, leaving a space of three tenths of an inch between the mark "$" and these figures, and also wrote in the words "sixty-seven" before the word "dollars" in the body of the note, leaving three inches of the blank space before the words "sixty-seven" unfilled; signed the note thus filled out, and presented it to the defendants, who, at his request and for his accommodation, signed the note as a note for sixty-seven dollars, and with no knowledge or expectation that the note was to be altered, given or negotiated for any other or larger sum, and without any authority to him to alter or increase the amount of the note.

Bardwell then, without the knowledge of the defendants, fraudulently wrote the figure "4" before the figures "67" at the top of the note, and "the words "four hundred and" before the words "sixty-seven" in the body of the note; and on the note so altered, the plaintiff, without any notice of the alteration, lent to Bardwell the sum of $467. The note was then in the condition it now is, and there was no mark or indication of al teration.

If, as matter of law on the foregoing facts, the plaintiff was entitled to recover on the note, judgment was to be entered for the plaintiff; otherwise for the two defendants who appeared.

D. Aiken & C. C. Conant, for the plaintiff.

C. Delano & G. M. Stearns, for the defendants.

GRAY, C. J. This action is brought upon a promissory note, signed by George W. Bardwell, Cyrus A. Stowell, Timothy D. Richardson and Charles Stowell, and appearing in its present condition, and alleged in the declaration, to be a note for $467. Cyrus A. Stowell and Timothy D. Richardson only defend the action.

It is agreed that the note is upon a blank printed form; that, as originally prepared and signed by Bardwell, and signed by the

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defendants at his request, it was a note for $67; and that Bardwell afterwards, without the authority or knowledge or expectation of the defendants, fraudulently prefixed the figure "4" to the figures "67," and the words "four hundred and" to the words "sixty-seven," and in that form, and with no mark or indication of alteration, negotiated it to the plaintiff, who lent him $467 thereon.

The plaintiff contends that the defendants were negligent in signing the note with such blanks as enabled the fraudulent alterations to be made without danger of detection, and are therefore liable to an innocent holder for value upon the note as so altered. But after deliberate advisement, and careful examination of the authorites cited in the learned arguments at the bar, we are of opinion that this position cannot be maintained.

It is a general rule of our law, that a fraudulent and material alteration of a promissory note, without the consent of the party sought to be charged thereon, whether made before or after the delivery of the note, renders the contract wholly void as against him, even in the hands of one who takes it in good faith and without knowledge or reasonable notice of the alteration. *Hall* v. *Fuller*, 5 B. & C. 750; *S. C.* 8 D. & R. 464. *Warrington* v. *Early*, 2 El. & Bl. 763. *Wood* v. *Steele*, 6 Wall. 80. *Angle* v. *Northwestern Ins. Co.* 92 U. S. 330. *Fay* v. *Smith*, 1 Allen, 477. *Draper* v. *Wood*, 112 Mass. 315. *Citizens' National Bank* v. *Richmond*, 121 Mass. 110.

If indeed a man indorses a blank form of note, and delivers it with the intention that the blank should be filled, he thereby makes the person to whom he delivers it his agent, and is responsible for whatever date, sum or time of payment he may insert, to a *bonâ fide* indorsee. *Russel* v. *Langstaffe*, 2 Doug. 514. *Violett* v. *Patton*, 5 Cranch, 142. So, if he delivers the note with the date or sum in blank, he is held to authorize the blank to be filled up with any date or sum. *Bank of Pittsburgh* v. *Neal*, 22 How. 96. *Androscoggin Bank* v. *Kimball*, 10 Cush. 373. *Abbott* v. *Rose*, 62 Maine, 194.

In an early case in this court, partners, one of whom had left their blank indorsements with their clerk for use in their business, were held liable to a *bonâ fide* holder upon one of such indorsements which had been obtained from the clerk by fraud

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and Chief Justice Parsons said, that the objection that the note ought to be considered as a forgery of the names of the indorsers "would have great weight, if, when the indorsers put the name of the firm on the paper, they had not intended that something should afterwards be written, to which the name should apply as an indorsement; for then the paper would have been delivered over unaccompanied by any trust or confidence;" but that the court "must consider a delivery by the clerk, who was entrusted with a power of using these indorsements, (although his discretion was confined,) as a delivery by one of the house; whether he was deceived, as in the present case, or had voluntarily exceeded his direction; for the limitation imposed on his discretion was not known to any but to himself and to his principals." *Putnam* v. *Sullivan*, 4 Mass. 45, 53, 54.

The principal authorities in support of the plaintiff's position are in those countries whose jurisprudence is immediately derived from the civil law. Pothier was of opinion that if the mistake of a banker, in paying a bill for too large a sum, was induced by the fault of the drawer, in not taking care to write the bill in such a manner as to prevent fraudulent alteration, as, for instance, if he wrote the sum in figures to which a cipher was afterwards added, the drawer should in such case be held to indemnify the banker for what he had lost by the fraudulent alteration which the drawer by his own fault had afforded opportunity to make. Pothier Contrat de Change, pt. 1, *c.* 4, § 99. Similar views have been taken by courts in Scotland and in Louisiana in cases of promissory notes held by indorsees. *Pagan* v. *Wylie* and *Grahame* v. *Gillespie*, reported in Morison's Dict. Dec. 1660, 1453, and more briefly in Ross on Bills & Notes, 194, 195. *Isnard* v. *Torres*, 10 La. Ann. 103.

In *Young* v. *Grote*, 4 Bing. 253; *S. C.* 12 Moore, 484; although Chief Justice Best quoted with approval the opinion of Pothier, the point adjudged was much narrower; for in that case the drawer had left with his wife checks signed by himself in blank, and the fraudulent alteration was made by his clerk, who was directed by the wife to fill out the check; and, it having been found by an arbitrator that the maker had been guilty of gross negligence by causing his check to be delivered to his clerk in such a state that the latter could and did by the mere insertion

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of additional words make it appear to be his check for a larger sum, it was held by the court that he could not recover that sum from his banker, who had paid it.

The subsequent comments of eminent English judges upon *Young* v. *Grote* have limited the doctrine there laid down to the peculiar circumstances of that case.

In *Robarts* v. *Tucker*, 16 Q. B. 560; *S. C.* 15 Jur. 987; 20 L. J. (N. S.) Q. B. 270; bankers who had paid a bill upon a forged indorsement were held not to be entitled to recover the amount from their customer, the drawer. The judgment in the Exchequer Chamber was delivered orally by Baron Parke, and his comments upon *Young* v. *Grote* are variously stated in the different reports. In 16 Q. B. 580, he is reported to have said: "This was in truth considering that the customer had by signing a blank cheque given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted." But no such general statement appears in either of the other reports. In 15 Jur. 988, the words attributed to him are: "But in that case there was negligence in the drawing of the cheque itself, which was the authority given by the drawers to the bank." The report in the Law Journal is fuller and apparently more exact: "There the court held, that the cheque was drawn in so negligent a way as to facilitate the forgery and to exonerate the banker from liability to his customer for paying the amount. They, in truth, consider that he, as it were, gave authority to the party to fill up the cheque in the way it was filled up." 20 L. J. (N. S.) Q. B. 273. This substantially accords with the later statements of the same eminent judge, and of Lord Cranworth and of Chief Justice Erle, in deliberately considered judgments, which put the decision in *Young* v. *Grote* upon the ground that the customer's negligence in the transaction had afforded opportunity for the fraud of his clerk, by which the bank was deceived. *Bank of Ireland* v. *Evans Charities*, 5 H. L. Cas. 389, 410, 413. *Orr* v. *Union Bank of Scotland*, 1 Macq. 513, 523. *British Linen Co.* v. *Caledonian Ins. Co.* 4 Macq. 107, 114. *Ex parte Swan*, 7 C. B. (N. S.) 400, 431, 433. See also *Arnold* v. *Cheque Bank*, 1 C. P. D. 578, 587, 588.

In some of these cases, the negligence of the drawer was spoken of as creating an estoppel. But that view has been

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disposed of by Chief Justice Cockburn, with his characteristic clearness and vigor, saying: "The case of *Young* v. *Grote*, on which so much reliance has been placed, and which is supposed to have established this doctrine of estoppel by reason of negligence, when it comes to be more closely examined, turns out to have been decided without reference to estoppel at all. Neither the counsel in arguing that case, nor the judges in deciding it, refer once to the doctrine of estoppel. The question arose on a disputed item in an account between a banker and his customer, which had been referred to arbitration, and the question raised by the arbitrator was on whom the loss which had arisen from payment of a check, in which, by the carelessness of the customer, an opportunity had been afforded for increasing the amount, should fall. It was held, not that the customer was estopped from denying that the check was a forgery, but that as the loss, which would otherwise fall on the banker, who had paid on a bad check, had been brought about by the negligence of the customer, the latter must sustain the loss. As the question arose on an account submitted to arbitration, the matter was decided without reference to any technicality; but I am disposed to think that, technically looked at, the matter would stand thus: The customer would be entitled to recover from the banker the amount paid on such a check, the banker having no voucher to justify the payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter. Possibly, to prevent circuity of action, the right of the banker to immunity in respect of the loss so brought about would afford him a defence in an action by the customer to recover the amount." *Swan* v. *North British Australasian Co.* 2 H. & C. 175, 189, 190. And in *Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 183, 192, which was very similar in its facts to *Young* v. *Grote*, and in which the alteration of certain drafts was made by a clerk entrusted with the duty of filling them up, the Court of Exchequer, after advisement, expressed the opinion that the ground assigned by Chief Justice Cockburn, of avoiding circuity of action, was certainly the most exact ground.

The maker of a promissory note holds no such relation to the indorsees thereof as a customer does to his banker. The rela-

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tion between banker and customer is created by their own contract, by which the banker is bound to honor the customer's drafts; *Marzetti* v. *Williams*, 1 B. & Ad. 415; *Bank of the Republic* v. *Millard*, 10 Wall. 152; *Carr* v. *National Security Bank*, 107 Mass. 45; and if the negligence of the customer affords opportunity to a clerk or other person in his employ to add to the terms of a draft and thereby mislead the banker, the customer may well be held liable to the banker. But, even as between customer and banker, the former has not been held liable for an unauthorized alteration or addition by a stranger. And that the signer of a note, complete upon its face, and not entrusted by him to any person for the purpose of being filled up or added to, but afterwards altered, without his authority or assent, by the insertion of additional words in blank spaces therein, should be held to have contracted with every subsequent innocent holder who may be thereby defrauded, and to be liable to him in an action on the note in its altered form, is unsupported by any English decision of which we are aware, and appears to us to be inconsistent with the weight of American authority and unfounded in principle.

In *Angle* v. *Northwestern Ins. Co.* 92 U. S. 330, the rule was stated to be that, where a party to a negotiable instrument entrusts it to another for use as such, with blanks not filled up, such instrument, so delivered, carries on its face an implied authority to fill up the blanks necessary to perfect the same, and, as between such party and innocent third persons, the person to whom the instrument is so entrusted must be deemed the agent of the party who committed the instrument to his custody, in filling the blanks necessary to perfect the instrument; but that the custody of the paper, under such circumstances, does not confer authority to make any addition to the terms of the note, or to make a new instrument, by erasing what is written or printed, or by filling the blanks with stipulations repugnant to the plainly expressed intention of the instrument as shown by its written or printed terms; and, if any such addition or alteration of a material character is made, without the consent of the party from whom the paper was received, it will avoid the note, even in the hands of an innocent holder. 92 U. S. 331, 338, 340.

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In *Fay* v. *Smith*, 1 Allen, 477, it was held by this court that an alteration by the payee, though without fraudulent intent, of a promissory note, by adding at the end the words "with interest," did not bind the maker, because he never made nor authorized to be made the note which the payee accepted; and that, by reason of such alteration, the note was wholly void as against the maker, even in the hands of a *bonâ fide* indorsee. A similar decision was made in *Draper* v. *Wood*, 112 Mass. 315, in which a joint promisor, before the delivery of the note, added the words "at twelve per cent.," without the authority of his co-promisor. It is true that, in the last case, the point that the defendant should be held liable because he had carelessly signed the note in such a form as admitted of the alteration afterwards made was not taken at the trial, and therefore was not considered by this court.

But in *Wade* v. *Withington*, 1 Allen, 561, a similar question, upon facts more closely resembling those now before us, was considered; the defence that a note for one hundred dollars had been fraudulently altered after it had been signed, by inserting the words "and forty," was sustained against a *bonâ fide* indorsee, although the alteration could not be detected upon the most careful scrutiny; and Chief Justice Bigelow distinguished the cases of *Young* v. *Grote* and *Putnam* v. *Sullivan*, above cited, upon the ground that in those cases the instruments were filled up and put in circulation by agents, to whom the parties had entrusted them, signed in blank, for that purpose. The same distinction was again taken in *Ives* v. *Farmers' Bank*, 2 Allen, 236, 241, in *Sewall* v. *Boston Water Power Co.* 4 Allen, 277, 282, and in *Belknap* v. *National Bank of North America*, 100 Mass. 376, 381.

The fact that, in the present case, the alteration was made before the note was delivered to the payee, and by one of the makers, at whose request and for whose accommodation the others had signed it, does not enlarge their liability. He had no authority from them, express or implied, to alter or add to the terms of the note. *Wood* v. *Steele*, 6 Wall. 80. *Agawam Bank* v. *Sears*, 4 Gray, 95. *Draper* v. *Wood*, 112 Mass. 315. *Waterman* v. *Vose*, 43 Maine, 504.

The case of *Goodman* v. *Eastman*, 4 N. H. 455, is singularly like the case at bar. A note for twenty dollars was altered by

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one of two makers, after it had been signed by the other and before it was delivered to the payee, by inserting the words "one hundred and" before "twenty;" and it was held that the other maker was not liable upon it, because the payee had been deceived and defrauded, not by any abuse of the confidence which the defendant reposed in the maker, and for which the defendant ought to be responsible, but by a forgery, for which he was not responsible.

The decision of the Commission of Appeals in *Redlich* v. *Doll*, 54 N. Y. 234, cited for the plaintiff, was that the delivery of a promissory note, containing the word "at" followed by a blank for the place of payment, carried with it implied authority to any *bonâ fide* holder to fill the blank. But it was said in the opinion, that "if the word 'at' had not been inserted in the note, it would have been a complete note without the insertion of other words" — clearly implying that, if the form of the note had not called for the insertion of additional words, none could have been inserted so as to bind the maker.

It had been previously decided by the Court of Errors of the State of New York, in *Woodworth* v. *Bank of America*, 19 Johns. 391, that the addition, by the maker of a note, of words designating the place of payment, discharged an indorser; and by the Supreme Court of that state, in *Nazro* v. *Fuller*, 24 Wend. 374, in accordance with the English decisions, that such an addition by the payee discharged the maker.

In the subsequent case of *McGrath* v. *Clark*, 56 N. Y. 34, it was held by the Court of Appeals, that where a note in this form, "$175. Whitehall, N. Y., Nov. 27, 1868. after date I promise to pay Wm. McGrath or bearer $175 at," was signed by the maker and indorsed by the payee, and the maker afterwards, and before its delivery to the indorsee, filled the blanks by inserting "six months" at the beginning, and by adding at the end "the National Bank of Poultney with interest," the addition of the words "with interest" was an unauthorized alteration which invalidated the note as against the indorser; and Chief Justice Church said: "The rule that 'whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it,' is not applicable, for the reason that the indorser did not, in

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any legal sense, enable the maker to make the alteration. He indorsed a note for a specific sum, which, as we have seen, conferred no authority upon the maker to change or alter it. If it did, indorsers would occupy a perilous position. An indorsement of a note for $1000 would authorize the maker to change it to $10,000. It matters not whether the amount is large or small, the principle involved is the same."

In *Worrall* v. *Gheen*, 39 Penn. St. 388, the case stated for the opinion of the court was as follows: A printed blank note was filled up by the maker, by inserting "50" at a little distance from the mark $, and by writing "fifty" near the end of a blank line and close to the word "dollars," and in this condition was signed by the maker and indorsed by the payee. The maker then took the note away, and fraudulently altered its amount from $50 to $150, by adding the figure 1 between "$" and "50," and the words "one hundred &" before the word "fifty." The fraud was so well executed that the appearance of the note was not such as to excite the suspicions of a man in ordinary business, although on inspection a difference might be perceived in the color of the ink with which the words "one hundred &" were written. The note as thus altered was discounted by the plaintiff, who had it regularly protested at maturity, and sued the indorser thereon. It was held that he could not be charged upon the note in its altered form; and Chief Justice Lowrie, after saying that the court could not follow the Scotch cases of *Pagan* v. *Wylie* and *Grahame* v. *Gillespie*, above cited, and would not be understood as denying, but only as doubting, the case of *Young* v. *Grote*, because it might be that a check on a banker, so written as to be easily altered by the bearer of it, ought to be treated in the same manner as instructions sent by a principal to his agent, in which the latter is not allowed to suffer for the carelessness of the former, proceeded as follows: "This is a case of a printed form of a promissory note, filled up by the maker, and then indorsed for his accommodation by another, and then altered by the maker to a larger sum by taking advantage of some vacant space left in the form. If the sum had been left entirely blank, the inference would have been that the parties authorized the holder to act as their agent in filling it in, and they would have been bound accordingly.

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But where a sum is actually written, we can make no such inference from the fact that there is room to write more. This fact shows carelessness; but it was not the carelessness of the indorser, but the forgery of the maker, that was the proximate cause that misled the holder. And we know not how we can say that a man can be chargeable with a contract because he did not use proper precaution in guarding against forgery in any of the thousand forms it may take. We know of no way of saving purchasers of negotiable paper from the necessity and the consequences of relying on the character of the man they buy it from, if they do not take the trouble of inquiring of the original parties."

The decision in *Worrall* v. *Gheen*, that the plaintiff might recover upon the note as originally executed, is treated in *Neff* v. *Horner*, 63 Penn. St. 327, as exceptional and doubtful; is opposed to the decisions of this court in *Wade* v. *Withington*, 1 Allen, 561, *Draper* v. *Wood*, 112 Mass. 315, and *Citizens' National Bank* v. *Richmond*, 121 Mass. 110; and appears to have been founded upon a misunderstanding of the decision in the Scotch case of *Grahame* v. *Gillespie*, in which, as to the bill on which the defendants were held not to be liable in its altered form, the court, reversing a judgment which held them liable for the original amount, "suspended the letters simpliciter," which we understand to be equivalent to ordering a nonsuit. Morison's Dict. Dec. 1453, 1457. Ross on Bills & Notes, 195, 201.

The later cases in Pennsylvania, we are constrained to say, appear to us to be inconsistent and unsatisfactory, both in their reasoning and in their results.

In *Garrard* v. *Haddan*, 67 Penn. St. 82, the person from whom the consideration of the note moved filled up a printed blank form by inserting the words "one hundred," and, after it had been signed by the maker, added the words "and fifty," so that the alteration could not have been detected upon the most careful inspection. The lower court, upon the authority of *Worrall* v. *Gheen*, above stated, gave judgment for a *bonâ fide* indorsee against the maker for the original amount. Upon a writ of error sued out by the defendant, the judgment was affirmed. We cannot regard as authoritative the expression of opinion that the maker was liable upon the note as altered, for several rea

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sons: 1st. It was purely extrajudicial, for the plaintiff had sued out no writ of error. 2d. It relies upon the Scotch decisions which the same court in *Worrall* v. *Gheen* had declined to follow. 3d. It avowedly rejects the distinction taken by this court in *Wade* v. *Withington*, 1 Allen, 561, above cited, restricting such liability to cases in which the alteration is made by an agent, clerk or other person in whom the maker has reposed confidence. 4th. It asserts that no such restriction was made in *Putnam* v. *Sullivan*, 4 Mass. 45 — in direct contradiction of the statement of Chief Justice Parsons in that case, quoted in the early part of this opinion. 5th. It inaccurately states that *Worrall* v. *Gheen* "was a case of a perceptible alteration;" whereas that case, as already mentioned, expressly found that "the fraud was so well executed that the appearance of the note was not such as to excite the suspicions of a man in ordinary business;" and according to the opinion in *Phelan* v. *Moss*, 67 Penn. St. 59, delivered on the same day as that in *Garrard* v. *Haddan*, the only material question was whether the indorsee took it in good faith.

In *Zimmerman* v. *Rote*, 75 Penn. St. 188, in which there was a memorandum on the margin of the note, making the time of payment conditional upon the amount of profits received by the maker from the patent right in consideration of which the note was given, it was held that, although that memorandum was found by the jury to have been written by the parties when the note was made, and intended to be a substantive part thereof, yet the fraudulent cutting or tearing off of that part did not destroy the note or affect its validity in the hands of an indorsee. In *Brown* v. *Reed*, 79 Penn. St. 370, where a similar fraud was perpetrated by combining all the terms in one writing, so cunningly framed that by dividing it perpendicularly one half would be left a complete promissory note, it was held that such a division of the writing was a forgery which destroyed the note, unless the line of demarcation was so apparent on the face of the writing that the maker was negligent in not observing it. As in each of these two cases the instrument, in the form in which it was signed by the defendant, was not an unconditional promise for the payment of money, and therefore was not a negotiable promissory note, it is difficult to understand how the defendant could be bound to anticipate that it might be negotiated to a *bonâ fide*

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indorsee. *Benedict* v. *Cowden*, 49 N. Y. 396. *Gerrish* v. *Glines*, 56 N. H. 9. *Stults* v. *Silva*, 119 Mass. 137.

The other cases cited by the learned counsel for the plaintiff do not, upon examination, appear to support their position. In *Cochran* v. *Nebeker*, 48 Ind. 459, which was substantially similar in its facts to *Zimmerman* v. *Rote*, 75 Penn. St. 188, above cited, the decision was that an answer of the maker, alleging that the tearing off of the condition, after the delivery of the note, by some one to the defendant unknown and without his knowledge or consent, set forth a good defence to an action by an indorsee. In *Yocum* v. *Smith*, 63 Ill. 321, the maker, who was held liable upon a note in which the words "and twenty" had been inserted between the words "three hundred" and "dollars," had been informed by letter from the indorsee, very soon after the date of the note, that he had bought it and of its date and amount, and made no objection for nearly a year afterwards, so that he might well be held to have ratified it in its altered form.

In *Holmes* v. *Trumper*, 22 Mich. 427, it was held, in a very able judgment, delivered by Mr. Justice Christiancy, and in which Chief Justice Campbell and Justices Graves and Cooley concurred, that a promissory note which consisted of a printed blank, with the amount and the time and place of payment filled in with writing, and was altered, without the knowledge or consent of the maker, by adding, after the printed words "with interest at," at the end of the note, the words "ten per cent.," was thereby rendered void, even against an indorsee who bought it in good faith. That decision goes further than the case before us requires; but some of the reasons are so forcibly stated, and so applicable, that we cannot close this opinion better than by quoting a few passages.

"The argument amounts simply to this: That by the maker's awkwardness or negligence his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word 'at' and to draw a line through the blank which followed it; and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way.

"But how such a crime, whether committed in this or in any other way, could create a contract on the part of the maker, we

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confess ourselves unable to comprehend; nor are we satisfied that a forgery committed in this way would be any less liable to detection than if committed in many other ways. The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument; or as if an instrument were written with ink, the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper; or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word."

"Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery, in whatever mode it may be accomplished; and, unless perhaps when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders.

"If promissory notes were only given by first class business men, who are skilful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in behalf of the plaintiff in error would require. But for the great mass of the people, who are not thus skilful, nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men, of even fair education and competency for business, at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper." 22 Mich. 434–436.

Judgment for the defendants

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EDWARD C. HAWKS *vs.* INHABITANTS OF HAWLEY.

Franklin. Sept. 18.—19, 1877. ENDICOTT & LORD, JJ., absent.

On the issue whether an alleged defect, outside of the travelled part of a highway, was within its limits, the distance between the defect and the other side of the highway being six and a half feet, the judge instructed the jury that there was no presumption that the highway was laid out wider than that because it was a county road, and refused to instruct them that they could not take into consideration the probability of a county road being laid out as narrow as the highway at that place. *Held*, that this instruction was erroneous.

TORT for injuries occasioned by an alleged defect in a highway, which the defendant was bound to keep in repair.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff's evidence tended to show that on the evening of October 18, 1875, he was travelling on the highway in question with a horse and carriage, and was driving with due care; that the highway was a county road running over a mountain. No record evidence of the location of the road was offered, or any evidence of its located limits other than what may be inferred from the evidence in the case.

The alleged defect was the narrowness and crookedness of the road, and a rock, around which the travelled part of the road curved so much that a straight line extending from the centre of the travelled part of the road, thirty feet above the rock, to the centre of the travelled part of the road thirty feet below the rock, would run close to the rock. The rock two and a half feet from the travelled part of the road was one and a half feet higher than the travelled part of the road, and, five feet from the travelled part, two and one half feet higher, and was a ledge sloping down the mountain's side gradually to the travelled way.

The evidence also tended to show that the plaintiff's carriage was overturned by the wheels on one side coming upon the side of the rock next to the road, while the horse was in the travelled part of the road; that on the opposite side of the road from the rock there were logs, or a log resting upon a bank or bank wall, several feet above the ground below, making a kind of railing; that the distance between the rock and the log, as one witness testified, was only six and one half feet, or, as another

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witness testified, seven and one half feet; that both the log and rock bore marks of having been hit by the wheels of carriages which had passed over the road; that both above and below the rock, and within ten or fifteen feet of the point of the rock, the road was several feet wider than at the rock; that the width of the travelled part was six and one half feet to seven and one half feet only at that point, and widened gradually in both directions so that it was more than twice that width ten or fifteen feet from the rock; and that there was a ditch to turn the water from the travelled part of the road, which was as many as ten feet above the rock and sixteen and a half feet from the log, but there was no evidence to show who built or maintained the ditch.

At the trial the plaintiff introduced a plan of the road at the place of the accident, indicating the rock, the width of the travelled part both above and below the rock, the logs on the lower side of the road, and the ditch on the upper side of the same and beyond the rock; and the correctness of this plan was not controverted.

The defendant contended that the narrowness and crookedness of the road were not defects in the road in and of themselves, and that there was no evidence that the road was located wider than the travelled path. The plaintiff contended that the jury might presume that the road was laid out over six and one half feet wide because it was a county road. The judge instructed the jury that the town would not be liable for an injury received by a traveller merely by reason of the narrowness or crookedness of the road, provided it was so located; that the town was only bound to keep in repair the way as located and laid out by the county commissioners; that the jury might determine the location of the road and whether it was constructed and worked as located; that, in determining this question, they might consider the plan, the indications proved, the width of the road above and below the rock or ledge, the course of travel and the proved facts in the case; that, if the road was not made and worked as located, it was for the jury to say whether or not the road was defective by reason of its crookedness or narrowness, or the proximity of the rock to the travelled part of the way; and also instructed the jury as to the circumstances under which

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an object outside the travelled path and within the limits of the highway as located might be a defect. No exception was taken to these rulings.

The defendant then asked the judge to instruct the jury that there was no presumption that the road was laid out over six and one half feet wide because it was a county road. The judge gave this instruction, and refused to give the following instruction requested by the plaintiff: "That in determining the width of the located way they might consider the probability of a county road being located as narrow as was the wrought or travelled part of this road against the point of rocks."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

G. M. Stearns, (*A. De Wolf* with him,) for the defendant, was first called upon.

S. T. Field, for the plaintiff, was not called upon.

By the Court. The refusal of the instruction requested by the plaintiff, taken in connection with the instruction given at the request of the defendant, and not being controlled by the previous instructions of the court, tended to mislead the jury by making them understand that they could not take into consideration the probability of a county road being laid out less than six and a half feet wide, as bearing upon the question whether the alleged defect was within the limits of the highway.

Exceptions sustained.

Walter H. Ross *vs.* Cynthia B. Ross & others.

Hampden. Sept. 27, 1876. — Sept. 5, 1877. Colt, Morton & Soule, JJ., absent.

Where A. claims the rights of a child and an heir in an intestate's estate under an indenture between the intestate and wife and A.'s father, and also under an adoption, according to a statute and a judicial decree, the question of his rights under the contract will not be determined by a bill in equity until his status as a child of the intestate has been settled in an action at law or in the Probate Court.

Bill in equity against the administrators and heirs at law of James M. Ross, alleging that James M. Ross died on May 19

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1873, having his domicil in this Commonwealth, intestate and without issue; that he left a large estate consisting of both real and personal property, a large part of which was situate in this Commonwealth; that Ross and his wife, Cynthia B., on December 13, 1870, resided in the county of Erie and State of Pennsylvania, and on that day executed an indenture with John W. Smith, the father of the plaintiff, also a citizen of that state, by which the latter gave up all his right and claim to the custody, management and education of his infant son to Ross and his wife, to be by them cared for, nourished and governed as if he had been their child; and consented that the child might be called Walter H. Ross, and by that name be known so long as he should live; that by the indenture Ross and his wife covenanted and agreed to and with the said John W. Smith, that they would adopt the said Walter H. Ross as and for their own child; that the indenture contained the further covenants on the part of James M. and Cynthia B. Ross: "And they do hereby further covenant and agree that said Walter shall inherit and become heir to their estate as if the said Walter were of their own bodies, together; and in case the said James M. and Cynthia B. shall have other children, then in that case the said Walter shall hold, possess and enjoy equal share or shares with the same;" and that "they will authorize, empower and direct their executors and administrators to carry out and enforce the provisions of this indenture."

The bill further alleged that, at May term 1871 of the Court of Common Pleas for the county of Erie and State of Pennsylvania, on the petition of James M. Ross, it was decreed that the plaintiff should assume the name of Walter H. Ross, and have all the rights of a child and heir of James M. Ross; that the defendants denied that the plaintiff, by reason of such adoption, was entitled, under the laws of this Commonwealth, to inherit either the real or personal estate of James M. Ross, or that the contract was binding on his estate; and prayed that the administrators might be directed to execute and deliver to the plaintiff deeds of that portion of the real estate, and to pay over such portion of the personal estate of James M. Ross as he was entitled to receive and inherit as his only child and heir, and under and by virtue of said contract.

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The defendants demurred for want of equity, for multifariousness, and because the plaintiff had commenced an action at law in this court, against the intestate's estate, embracing substantially the same matters alleged in the bill.

Hearing, upon the pleadings, before *Devens*, J., who reserved the case for the consideration of the full court.

N. A. Leonard, for the plaintiff.

J. M. Ross, for the defendants.

GRAY, C. J. The plaintiff claims the rights of a child and an heir in the estate of a citizen of this Commonwealth, who died here intestate and without issue. This claim is based upon two grounds: 1st. Of contract, under an indenture, by which the intestate and his wife covenanted with the plaintiff's father that they would adopt, maintain and educate the plaintiff as their child, that he should inherit their estate as if he were such, and that they would authorize and direct their executors and administrators to carry out the provisions of the indenture. 2d. Of status, under an adoption of the plaintiff as a child of the intestate, according to a statute and a judicial decree in Pennsylvania, while both parties resided in that state. Upon consideration of the novel and interesting questions thus presented, we are of opinion that they cannot properly be determined in this form and at this time.

If the plaintiff has the status of a child of the intestate, and is entitled as such to a share of his estate in this Commonwealth, this bill cannot be maintained upon either ground: not upon the first, because there has been no breach of the covenants or obligations of the indenture; not upon the second, because the bill does not show that the plaintiff needs the interposition of a court of equity to secure his rights. His title, if any, in the real estate, by virtue of such status, vested in him upon the death of the intestate, cannot be affected by any acts of the administrator or of the next of kin, and may be asserted by action at law; and as to any rights in the personal estate he can have adequate relief in the Probate Court. This court, sitting in equity, has no jurisdiction to distribute the estates of intestates, and can give no greater effect to the laws of another state, either by their own force, or by way of comity, than a court of common law or of probate.

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As the bill cannot be maintained upon the second ground, in any event; and can be maintained upon the first ground, if at all, only if the plaintiff has not the status of a child of the intestate in this Commonwealth; the further consideration of the question whether the bill can be maintained upon the ground of contract must be suspended, until the status of the plaintiff shall have been tried and determined in an appropriate form of proceeding. *Ordered accordingly.*

PHILIP REILLY *vs.* ASA P. RAND.

Hampden. Sept. 25. — 26, 1877. ENDICOTT & LORD, JJ., absent.

In an action for the use of a derrick, upon evidence being put in by the defendant that a block and chain on the derrick broke in using it, the plaintiff may put in evidence that it is a usual thing for blocks and chains on any derrick to break when in use.

A claim for the use of a chattel for a certain time is supported by proof that, during that time, the defendant had it in his possession, with the right to use it whenever he pleased.

CONTRACT on an account annexed for the use of a derrick.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff offered evidence tending to show that the derrick was in the defendant's possession a certain number of days; that the defendant, before it came into his possession, asked the plaintiff what he should charge for it, and the plaintiff answered that he should charge a dollar a day, Sundays excepted, from the time he should take it till he returned it; that the defendant replied that it was too much, but immediately afterwards, without any other conversation as to any definite price, and at the same interview, said he would send for it, and did send for it the next morning; and that the fair cash value for the use of such a derrick was a dollar a day.

The plaintiff asked a witness called by him, who testified that he was accustomed to use derricks, and used this derrick while in the defendant's possession, what was a fair price for the use of such a derrick per day, to which he replied a dollar a day. On cross-examination, this witness testified that the derrick was somewhat worn, that one of the blocks broke, and that one of

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tle chains broke frequently. On reëxamination, the plaintiff asked, "Is it a usual thing for blocks and chains on any derrick to break when in use?" The defendant objected, but his objection was overruled, and the witness answered "Yes."

The plaintiff also asked a witness called by him, who was accustomed to the use of derricks, how much difference it made with a derrick, whether it remained idle, standing in a quarry exposed to the weather, or was in actual use. The defendant objected on the ground that, under the pleadings, the plaintiff could recover only for the time the derrick was actually used by the defendant, and not for the time it stood idle in his quarry. The objection was overruled, and the witness replied that "it made no great difference." The evidence was uncontradicted that the derrick was set up in the defendant's quarry, and remained there during the whole time it was in his possession, but that it was standing unused at least three fourths of the time.

The jury returned a verdict for the plaintiff for the full amount claimed; and the defendant alleged exceptions.

E. B. Gillett & H. B. Stevens, for the defendant.

M. B. Whitney & J. R. Dunbar, for the plaintiff.

By the Court. The evidence admitted upon reëxamination was competent to show that the derrick was of the ordinary quality. The claim for use of the derrick by the defendant was supported by proof that he had it in his possession, with the right to use it whenever he pleased. *Exceptions overruled.*

Warren P. Knox *vs.* Rodolphus C. Clark.

Hampden. September 25. — 26, 1877. Endicott & Lord, JJ., absent.

On the issue of the location of a disputed boundary line, an experienced surveyor may testify that, in his opinion, a mark upon a certain tree was such as a surveyor would make, and that a certain pile of stones was, in his judgment, an ancient monument.

Tort for breaking and entering the plaintiff's close. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

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In order to fix the disputed boundary line, it was necessary to establish a certain corner, termed the northwest corner, the monument fixing which, if any had ever existed, the plaintiff contended had been obliterated.

It was in evidence that the land in question was upon one of the mountains of the town of Chester, in the vicinity of certain mineral lands; that its surface was very uneven and covered with trees, large boulders and small stones, thickets and briars; and that it was very difficult, if not impossible, to use surveyors' instruments with accuracy upon it.

The plaintiff introduced as a witness William M. Lewis, a surveyor, who exhibited a map of the land made by him from measurements by a chain, and testified in substance that, in order to fix the point of the obliterated corner monument, he proceeded to measure from other points where he found certain piles of stones, which he was permitted to call monuments, and then following the courses of a certain deed by measurements with the chain in the indicated direction, he fixed the point of the disputed monument, and so the line.

The plaintiff asked him this question, "State whether or not, in your opinion, the stones which you have described were placed there as a monument?" The witness answered, "I should think it was such a pile of stones as indicated a monument." The witness also testified as follows concerning a certain beech tree which the plaintiff contended was a monument: "I found a beech tree that was clearly marked as a monument, such a mark as a surveyor would make."

The plaintiff, in reference to these piles of stones, asked the witness the following question: "Could you form an opinion whether they were ancient monuments, or of recent erection?" The witness replied: "Yes, I should think that the pile of stones had been there quite a length of time." It was admitted that the surveyor had had long experience in surveying lands, and was a competent expert. The defendant objected to the above questions and answers; but the judge admitted them.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

E. H. Lathrop, for the defendant.

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G. M. Stearns & M. P. Knowlton, for the plaintiff.

BY THE COURT. The witness, having knowledge of the matters inquired of, was rightly permitted to testify.

Exceptions overruled.

COMMONWEALTH *vs.* ANDREW J. LYNN.

Suffolk. June 28. — September 4, 1877. AMES, J., absent.

At the trial of an indictment for an assault, there was evidence that A. agreed to sell to B. the business of a firm of which A. and C. were members; that the bill of sale and B.'s promissory note for a part of the consideration were, by agreement of all the parties, deposited with C., to be retained by him until B. should pay the balance of the consideration; that afterwards B. obtained possession of the bill of sale without paying or offering to pay the balance, and, in endeavoring to recover this paper, C. committed upon A. the assault complained of. The judge instructed the jury that the defendant had the right to use the force necessary to prevent B. from keeping the bill of sale, if it was rightfully in the possession of the defendant; but that, if the sale to B. was fraudulent, B. would have a right to retain the bill of sale. *Held*, that the defendant had good ground of exception.

INDICTMENT for an assault with a pistol upon one Paul. Trial in the Superior Court, before *Bacon*, J., who, after a verdict of guilty, allowed a bill of exceptions, the substance of which appears in the opinion.

H. E. Swasey, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

COLT, J. A bill of sale from one Shackford to Paul, conveying the interest of the former in the business of Lynn & Shackford, together with Paul's negotiable note for part of the consideration agreed on, were deposited with the defendant, upon an agreement between the parties that the latter should keep these papers in his possession until Paul should pay the balance of the purchase money, and then should deliver the note to Shackford and the bill of sale to Paul.

On the day following this transaction, Paul obtained possession of the bill of sale, upon expressing a desire to see the papers, without paying or offering to pay the balance. The assault complained of was committed in the immediate attempt by the defendant to recover this paper. Paul testified at the trial that

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he believed some fraud had been practised on him in the sale of the property, and that he intended to carry away the bill of sale.

The judge instructed the jury that the defendant had the right to use the force necessary to prevent Paul from keeping the bill of sale, if the same was rightfully in the possession of the defendant, or if the defendant was entitled to the possession of it. But he added that if, upon the evidence, they found the transaction between Shackford and Paul a fraud, or an attempted fraud, to which the defendant was a party, or of which he had knowledge, then Paul would have a legal right to retain the bill of sale for the purpose of preventing a consummation of the fraud.

This last instruction was erroneous; for, assuming that there was evidence that the sale to Paul was accomplished by a fraud upon him, yet he could only avoid the contract by restoring or offering to restore the other party to his former position, and surrendering all claim to the bill of sale. He had no right to obtain possession of the paper without paying the price agreed, and then hold it for the purpose of compelling the defendant to give up the contract and surrender the consideration. The law does not allow to a party injured such a mode of redress. He is not permitted to defeat one wrong by practising another.

If there was no evidence to warrant the jury in finding the alleged fraud, then the instruction was calculated to mislead the jury, and was erroneously given.

It is not necessary to consider whether the act proved constituted an assault, or whether the assault proved was justifiable. These questions, upon a new trial, may come up in a very different form. *Exceptions sustained.*

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COMMONWEALTH *vs.* JOHN GAZZOLO.

Suffolk. June 25. — Sept. 6, 1877. COLT & SOULE, JJ., absent.

On the issue whether a person, charged with receiving stolen goods, knew them to be stolen, evidence of the thief's reputation in the community, and among those by whom he was known, as to his being a regular and honest dealer in goods such as were stolen, is admissible.

INDICTMENT for receiving stolen goods.

At the trial in the Superior Court, before *Dewey*, J., there was evidence that one Salvini had been convicted of stealing the goods in question, which were boots and shoes; that the defendant lived in the same house and occupied the same room and bed with Salvini for a certain period during which the larcenies were supposed to have been committed; that Salvini professed to be an honest and lawful dealer in boots and shoes, and brought, from time to time, packages of the same to the house; that the defendant sold them for him on various terms, and bought and traded in them with him, and had so received a part of the stolen property; and that Salvini openly sold boots and shoes and traded in the same.

The defendant asked a witness called by him the following question: "What was Salvini's reputation and standing in the community, and among those by whom he was known, as to his being a regular and honest dealer in boots and shoes?" The judge did not allow this question to be answered.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. H. Hudson, for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

MORTON, J. One of the issues in this case was, whether the defendant, at the time he received the goods from the thief, knew that they were stolen. This involved an inquiry into the state of his mind, or his belief. Any evidence was competent which would tend to prove the existence of facts which would naturally influence the minds of men, under the same circumstances, in forming a conclusion upon the subject matter involved in the issue.

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Thus, where the question of reasonable cause to believe a person insolvent is in issue, it has been held that the general reputation of such person as to credit and solvency was competent. *Bartlett* v. *Decreet*, 4 Gray, 111. *Heywood* v. *Reed*, 4 Gray, 574. The reason is, that the belief of men who have not personal knowledge may reasonably be presumed to be influenced by the reputation which a party, with whom they have transactions, has acquired and maintained among those who know him.

In the case at bar, the government proved that the defendant received boots and shoes of Salvini under circumstances which would naturally excite suspicion in the mind of an honest man. The fact, if it existed, that the reputation of Salvini was that of "a regular and honest dealer in boots and shoes," would naturally tend to lull suspicion and induce the belief that the goods were not stolen. The weight of the evidence offered was for the jury; but we are of opinion that the question put to a witness for the defendant, "What was Salvini's reputation and standing in the community, and among those by whom he was known, as to his being a regular and honest dealer in boots and shoes?" was improperly excluded. *Exceptions sustained*

COMMONWEALTH *vs.* JOHN C. SULLIVAN.

Hampshire. Sept. 25. — 26, 1877. ENDICOTT & LORD, JJ., absent.

A witness who testifies of a sale of intoxicating liquor by the defendant may, for the purpose of fixing the time, state that he testified of the same sale at the preliminary hearing before a magistrate.

INDICTMENT on the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining on May 1, 1876, and on divers other days between that day and December 21, 1876, a certain tenement in Northampton for the illegal sale and illegal keeping of intoxicating liquors. Trial in the Superior Court on June 20, 1877, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

One of the witnesses for the government testified that he had bought liquor at the defendant's house, could not say when he

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bought it, but thought he bought it within a year; and that there was a hearing before the magistrate. The district attorney asked the following question: "Whether at the time you speak of, that you testified before the magistrate, you testified of the purchase of this same one half pint of gin? The defendant objected, but the judge allowed the question to be put for the purpose of fixing the time of the sale. Other witnesses testified to this sale, and fixed the time of it.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. H. Bond, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. The evidence was rightly admitted for the purpose of fixing the time of the sale, because it tended to show that the sale was made before the defendant was bound over by the magistrate, and consequently before the indictment was found. *Exceptions overruled.*

Commonwealth *vs.* Robert Scott & another.

Hampshire. October 5. — 19, 1877. Endicott & Lord, JJ., absent.

In a criminal case, the court may, at the request of the district attorney, appoint other counsel to assist him at the trial, if the interests of public justice seem to require it, and such counsel acts without any assurance or expectation of compensation from any private person.

A bill of exceptions, to the appointment of counsel in a criminal case to assist the district attorney, showed that there was evidence that the counsel stated to the court that he was present simply by procurement of the district attorney, without any assurance or expectation of compensation from any private source, and that he would be as free to act impartially as when he was district attorney; that he was first applied to by the counsel for a private party interested in the result of the trial, and afterwards by the district attorney; and, when asked whether he stood in such circumstances that he could possibly receive a present from the private party, replied facetiously that he should not care to have his virtue put to any very strong test. *Held*, that no error appeared in the decision of the judge, appointing him to act.

A defendant in a criminal case, not under oath as a witness, is not entitled to repeat something in the presence of the jury, to rebut evidence of a witness for the government, who testified that he identified the defendant by his voice.

On an indictment for breaking and entering a bank, after proof of a conspiracy between the defendant and others, in pursuance of which the bank was entered and

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robbed, evidence that a director of that bank was taken by one of the conspirators, other than the defendant, to see another conspirator, with whom he had negotiations relative to the return of the stolen property, is admissible.

At the trial of an indictment for breaking and entering, a witness may testify that, a few days before, he sold to a man certain articles of clothing like those left by the offender near the scene of the crime, there being other evidence tending to show that that man was the defendant.

At the trial of an indictment for breaking and entering a bank with intent to commit larceny therein, evidence of an accomplice of a general conspiracy previously formed between the defendant, himself and others to rob banks, in pursuance of which the robbery of the bank in question was planned and carried out, as well as of the acts of the conspirators in making preparations for carrying out the robbery, is admissible.

Evidence admissible to prove a crime charged is not made inadmissible because it tends to prove other crimes.

After proof of a conspiracy between the defendant and others to rob banks, and that, after a robbery, one of the conspirators met the others at a certain place, evidence that the conspirators had previously arranged for calling such meetings and for warning each other of danger by means of "personals" in a certain paper, the "personals" so inserted by them, and the paper containing them, are admissible; and whether the defendant did or did not see one of the "personals" inserted to warn him of danger is immaterial.

The admission, subject to the defendant's objection, of evidence which the jury are afterwards instructed to disregard, affords the defendant no ground of exception, if the evidence is competent.

Where, in a criminal case, the testimony of an accomplice is corroborated by other evidence, the judge is not required to advise the jury to acquit; and an instruction advising them of the suspicious character of his testimony, and that it was not safe to convict unless it was corroborated in some portion material to the issue, affords the defendant no ground of exception.

INDICTMENT against Robert Scott and James Dunlap, for breaking and entering, on January 26, 1876, the banking house of the Northampton National Bank, at Northampton, with intent to commit larceny therein. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

1. At the opening of the trial, the district attorney moved that Edward B. Gillett, esquire, be allowed to assist the government in the prosecution of the case. Objection being made by the defendants, Mr. Gillett stated to the court that, as he understood it, he was present simply by procurement of the district attorney, without any assurance or expectation of compensation from any private source, and that he would be as free to act impartially in the matter as he should be and as he was when he was acting in the judicial office as district attorney. In answer

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to interrogatories put by the defendants, it appeared that he was first applied to, to act in the trial, by letter from the private counsel of the bank, and that he afterwards received a letter from the district attorney requesting his assistance. The counsel for the defendants said, inquiringly, "You don't suppose that you stand in such circumstances that you could possibly receive, for the labor you may spend here, any present from the bank?" to which Mr. Gillett (facetiously) replied: "Well, sir, I should not care to have my virtue put to any very strong test, your honor, upon a subject of that sort, of course." To the further question, "Whether he would not consider it an extremely mean bank if it did not pay him?" he said, "I have not formed any opinion upon that subject."

The judge thereupon said that, unless there was something further, he would allow Mr. Gillett to act as desired by the district attorney; it being understood that the district attorney retained the responsible management of the case.

2. It appeared in evidence that, on the night of January 26-27, 1876, the Northampton National Bank was broken into, and that a large number of valuable securities were stolen from it. It also appeared in evidence that, on the same night, the house of John Whittelsey, the cashier of the bank, was entered by five masked burglars, with dark lanterns, when the different inmates of the house were taken from their several rooms and led into the room occupied by Whittelsey; that, after remaining there a short time, Whittelsey was ordered to dress, and was taken out of the room into the upper hall and there guarded for some time, and then taken down stairs, when the combination of the lock on the vault of the bank was extorted from him by two men whom he claimed to identify as the defendants. Upon his direct examination, Whittelsey stated that he identified them from their general appearance, height, size and form, and especially from their voices; that their voices impressed him more than anything else; that he suspected they might be arrested some time, and he watched them closely; that he noticed particularly Scott's broad shoulders. On cross-examination, the witness stated that there was nothing peculiar about the height, size and form of the defendants differing from other men in the community, excepting that the defendant Scott had a peculiar

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shrug about the shoulders; that he had noticed this shrug several times at the jail since Scott's arrest, but that he would not undertake to pronounce him guilty from this shrug alone; that he would undertake to identify them by the voice; and, to the question whether there was any peculiarity about the voice, he said he could not answer. The defendant Scott was then asked to stand up and repeat something, which he did, and the witness said he was suppressing his voice. Scott was then told by his counsel "to speak it right out." The judge then said, "I do not think this is competent." The counsel for the defendants contended that he had a right to have the peculiarities of the defendants' voices pointed out by the witness, and that for this purpose the voices themselves were competent to be introduced. The judge ruled otherwise.

3. The government contended, and, against the objection of the defendants, was allowed to show, by one William D. Edson, a witness for the government, that, in the year 1873, Edson, the two defendants and one William Connor formed a general conspiracy to rob banks; that it was a part of their plan and understanding that, in their travels through the country, they should obtain information of such banks as were insecure and feasible for robbery, and should report to each other the results of their observation; that in the summer of 1875, Edson, who was in the employ of Herring & Company, of New York, safe makers, and had been sent by them to Northampton on business of the company, first informed himself of the practicability of robbing the Northampton National Bank, and reported the same to the defendants at Wilkesbarre, Pennsylvania, and then furnished the defendants the means of duplicating the keys of the vault lock; that this was done in pursuance of their general conspiracy before mentioned.

4. The witness Edson was allowed, against the objection of the defendants, to testify as to the details of preparations made or robbing the Northampton National Bank in pursuance of said conspiracy; and he testified, among other things, that after meeting the defendants at Wilkesbarre, and giving them information about the dial and lock of the Northampton National Bank, which was about August 5, 1875, he, with Scott and Dunlap, returned to New York together, and that Scott and Dunlap

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there practised with the duplicate keys, which Scott had made, on a sample dial which Edson furnished them; that Scott and Dunlap agreed to go to Northampton in a day or two, which they did; that they told him, Edson, they had found where Whittelsey the cashier lived, in what part of the house, and how many there were in the family, &c.; that afterwards there was another meeting, when Connor was also present, and Scott, Dunlap and Connor all agreed to go to Northampton; that they afterwards said they had been there; that they had watched Whittelsey's movements, and those of the watchmen of the bank and of the town; that the witness, at their request, went to Northampton and saw the president and vice-president of the bank, and found that the dials were out of order, and went back to New York and told the defendants and Connor that they had better stop work then, as the bank would be more carefully guarded than usual; that this was in September, and the work was abandoned, and nothing further was done till November; that afterwards, Scott, Dunlap and Connor wanted the witness to come to Northampton and see about the Northampton National Bank; that the witness did so on November 22, and obtained impressions of the key at the bank, and, on his return to New York, gave the defendants the impressions; that he also afterwards found out the combination and gave it to the defendants; that he had five or six interviews with the defendants before the robbery in January. The defendants contended that the attempt to rob the Northampton National Bank in the summer of 1875 was abandoned, and that the evidence of that attempt was inadmissible. The government contended that the attempt was only temporarily suspended, and was resumed again in November. The judge admitted the evidence.

5. The government offered to show, by the witness Edson, that there were words and expressions, well understood by the defendants and Connor and Edson, by which they communicated with the witness Edson and with each other in the prosecution of their work under their conspiracy, through the column of the New York Herald, entitled "personals," and the witness Edson, against the objection of the defendants, was allowed to testify that on January 30, 1876, two "personals" appeared in the New York Herald which the witness claimed and stated were placed

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there, one by himself, which he explained was for the purpose of having William Connor meet him; and the other placed there by William Connor, which he, Edson, explained as calling for a meeting between himself and Connor on business connected with the robbery. A copy of the New York Herald of January 30, 1876, was produced, and the "personals" identified and read by Edson, as follows: (Edson's "personal") "Idalia, F. N., meet me on the Avenue Monday evening." (Connor's "personal") "Idalia, F. N., 8 sharp." Edson further testified that the defendants, Connor and himself had agreed upon this form of personal, if they wished to see him; and that he met Connor at the corner of 34th Street and Broadway at 8 o'clock Monday evening; that Connor took him to 60th Street and 10th Avenue, where he met Scott, and afterwards Dunlap; and that Connor at this time handed him over about $1200, as his portion of the money taken from the safe.

6. The government contended, and offered evidence tending to show, that on February 5, 1876, the defendant Scott went by boat from New York to New Haven, with two horses and a sleigh, intending to go thence to Hartford, Springfield and Northampton, for the purpose of obtaining and bringing to New York the securities of which the bank had been robbed, and which had been secreted near the place of robbery; that after Scott's departure, Connor and Edson met in New York, and Edson informed Connor of certain facts showing the danger of going to Northampton at that time, and convinced him that Scott ought to be recalled. The witness, Edson, against the objections of the defendants, was allowed to testify that on February 7, Edson, with the concurrence of Connor, inserted in the New York Herald a "personal" which read as follows: "Knox, come home," and he referred to a copy of the Herald containing this personal. The witness further testified that Connor told him that Scott formerly had a horse by the name of Knox and would recognize the personal. The government, in connection with this evidence, produced evidence tending to show that Scott returned to New York without the securities and without having visited Northampton. But Edson testified that Scott said that he returned on account of a paragraph in the Springfield papers and that he did not see the personal in the Herald.

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The defendants objected to the evidence of this personal, but the judge ruled that Connor was upon the evidence sufficiently connected with the conspiracy and with the robbery of the Northampton Bank to make his acts in furtherance of the common purpose of the conspirators admissible, and admitted the evidence, subject to the final consideration of the jury. The witness Edson further testified, against the defendants' objection, that, on the occasion when he told Connor that it was not safe for Scott to go to Northampton for the securities, Connor told him that he and Dunlap would go to Springfield and intercept Scott, and have him come home, and that other conversation passed between Connor and Edson at this time, having reference to the recalling of Scott. The admissibility of this evidence was discussed to the judge, as also its effect and bearing if admitted, and the government asked to have certain portions of it admitted, while it would not insist on other portions; but the judge ruled that all these declarations of Connor should go in, subject to the defendants' exception, or all should be excluded, and the government then elected to withdraw all these declarations, and the judge ruled that none of the statements of Connor or conversations between Connor and Edson in the absence of the defendants, should be considered by the jury as in evidence, and he should instruct the jury to disregard them; and in his charge the judge cautioned the jury not to consider any declarations of Connor or conversations between Connor and Edson, in the absence of the defendants. The defendants excepted both to the admission and the withdrawal of the evidence referred to. In the closing argument to the jury, the attorney for the government referred to this evidence and to the "personal," "Knox, come home," but no objection or exception was taken to this at any time, and the judge expressly charged that any declarations of Connor or Edson made in the absence of the defendants were not to be considered by the jury.

7. The witness Edson was allowed, against the defendants' objection, to testify that, in November, 1876, he took L. B. Williams, one of the directors of the bank, to see Connor in relation to negotiating for the stolen property. The witness had previously been allowed, against the defendants' objection, to state in his account of the conspiracy, and of the robbery of the

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Northampton Bank in pursuance thereof, that Connor's part in the conspiracy, and in the robbery of the bank in pursuance thereof, was to receive the money and distribute it, and negotiate the securities. The government, in connection with the foregoing evidence of Edson, called Williams, who testified that he, at the time mentioned by Edson, had an interview with Connor in relation to negotiating the stolen securities.

8. One Hall, of Springfield, a member of the firm of Hall & Prew, a witness for the government, was allowed to testify, against the objection of the defendants, that two persons came to his store in Springfield one or two afternoons before the announcement of the burglary, and purchased a pair of drawers and socks which were like some found among the things left at the cashier's house on the morning after the robbery. The witness identified certain overalls, by peculiar marks, as being those he sold at his store; he also said that the drawers were the same kind in all respects as he sold, so far as he could judge; but the witness could not say that either of the defendants was the one who purchased these goods; that he thought he had seen Dunlap before, but could not tell when or where. The witness also stated that he did up the goods in a paper wrapper with the printed advertisement of "Hall & Prew" thereon. The judge said that unless this evidence was afterwards further connected with the defendants it should be excluded. The government offered, as the further evidence relied on, the evidence of one Holt, also of Springfield, who testified that on the two days previous to the robbery he saw the defendants at various places in Springfield, and watched their movements; that they went into stores or saloons there, though the witness did not testify to seeing them go into Hall & Prew's store. The government further offered evidence tending to show that one of the masks left behind at Whittelsey's house had been cut from and exactly fitted the remaining portion of a leg of one of the pairs of drawers sold by Hall, and that this remaining portion of a pair of drawers was found with a great variety of burglars' tools, on the day before the robbery, at a place claimed by the government to be a place of rendezvous and concealment resorted to by the burglars. The government also offered evidence tending to show that a paper wrapper on which was the printed advertise-

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ment of "Hall & Prew," Springfield, was found among the burglars' clothing and tools left behind at Whittelsey's house and found on the morning after the robbery.

When the attorney for the government, in his closing argument, was commenting on the effect of this evidence of Hall, in connection with the other evidence recited, as tending to identify the defendants as the persons who bought the goods of Hall, the defendants made no suggestion or objection then, nor at any other time, that the evidence of Hall had not been properly connected with other evidence to make it admissible.

9. L. B. Williams, one of the directors of the bank, was called by the government and asked if he had a meeting with Connor on the occasion testified to by Edson, and he was allowed to answer that he had. He was then asked under whose direction, if any, he had this meeting; this was objected to, and the witness was allowed to answer that he had it by arrangement with Edson who took him to see Connor.

10. The witness Edson testified that he was to report to the defendants at Wilkesbarre, Pennsylvania, as to the Northampton National Bank, and that he did so. The time, place and circumstances of the interview between Edson and the defendants at Wilkesbarre, were claimed to be material evidence for the government; and, among other things, it was testified by Edson that it had been arranged between Dunlap and Edson that Edson should address Dunlap under the fictitious name of R. C. Hill, at the "Wyoming Valley House," Wilkesbarre. The register of this hotel was introduced, against the defendants' objection, and Edson was allowed to point out his own signature on the register, under date of August 5th, and also the alleged signature of Dunlap, under the assumed name of R. C. Hill, as on the register at the time Edson arrived, and, on the register, the room purporting to be assigned to R. C. Hill was No. 27, which room Edson visited and found Dunlap occupying, and that they there conferred together in regard to the Northampton Bank robbery. The defendants excepted to the admission in evidence of Edson's signature on the hotel register.

11. It was contended by the government that the witness Edson was corroborated on material points by the evidence of other independent witnesses, as well as by much circumstantial evi-

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dence, the tendency and effect of which was, as the government contended, to show that the acts and admissions of the defendants in relation to the robbery had been truthfully narrated by Edson, while the defendants contended that much of it only corroborated the mere acts and declarations of the witness Edson, and had no tendency to connect the defendants with the robbery. The judge gave instructions as to the kind of corroboration required. The defendants asked the judge to instruct the jury as follows: "That the corroboration required of the witness Edson is not the corroboration of that part of the witness's story which relates to his own acts and declarations, but corroboration of that part of his story which connects the defendants with the robbery." The judge declined to give the instruction in the terms requested, but did instruct them as follows: "That Edson, being a confessed accomplice, it was not safe for a jury to convict the defendants on his uncorroborated testimony, although, if they believed his testimony, they could do so. The testimony of an accomplice should be scrutinized with extreme caution by the jury, and it is not safe or prudent for the jury to convict in this case upon the evidence of Edson alone, unless he is corroborated in important and material respects in matters vital to the issue in this case." The judge had previously stated, in charging the jury, what matters and things it was incumbent on the government to prove, in order to ask of the jury a verdict of guilty, in terms to which no exception was taken.

The jury returned a verdict of guilty against both defendants; and the defendants alleged exceptions.

H. H. Bond, for the defendants. 1. Mr. Gillett should not have been allowed to act as prosecuting attorney. It is not contended that in certain instances other counsel may not assist the district attorney. But this right has been carefully guarded in each instance, and the general rule is, that under ordinary circumstances it is not to be permitted. *Commonwealth* v. *Williams*, 2 Cush. 582, 585. And, if improperly allowed, it is ground of exception. *Commonwealth* v. *Gibbs*, 4 Gray, 146. The office is essentially a judicial one, and, like all such offices, is carefully guarded from private influence and gift. In this case the first application came from private counsel of the bank, and Mr. Gillett plainly intimated that he was open to a gift

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from the bank. This was not the free, independent position which is required.

2. The peculiarities of the defendant Scott's voice were material to the issue, and the defendants were entitled to have these peculiarities pointed out on cross-examination. And for this purpose the voice of the defendant could be introduced, on the same principle that a party, on cross-examination, may write his name for the purpose of comparison. *Chandler* v. *LeBarron*, 45 Maine, 534. See also *King* v. *Donahue*, 110 Mass. 155. Suppose it were a peculiar garment that the prisoner had on, or there were some peculiarity in his shape, or some peculiar mark about his person, would it not be competent to ask the witness to point it out, introducing the garment or person for the purpose? And, if so, why not the voice? It is in the same way a material fact to be examined, compared and weighed in connection with the witnesses' testimony.

3. Evidence of the general conspiracy in 1873 was inadmissible. It is within the rule that different and distinct offences cannot be shown in evidence against the accused. That these parties conspired to rob banks in 1873 can have no legal tendency to show that they robbed the Northampton Bank.

4. An attempt which the witness said had been abandoned, and which was remote in point of time, cannot be introduced as evidence of a later robbery. Suppose they had actually broken in and stolen, could it be introduced in evidence? and why any more an attempt? See *Rex* v. *Birdseye*, 4 Car. & P. 386; *Regina* v. *Butler*, 2 Car. & K. 221.

5. The government had no right to put in the "personal" inserted by the witness Edson in the Herald; because he had no arrangement to that end with the defendants; and there was no evidence that they saw it. It related to Connor only; and was corroborating the witness by his own act.

6. The conversation with Connor, being after the alleged offence, was inadmissible. 1 Greenl. Ev. § 111. 1 Phil. Ev. (4th Am. ed.) 209. The defendants were injured by the judge allowing the government to put in the evidence, then to withdraw it, and then to urge it to the jury as a ground for conviction. See *Root* v. *Lowndes*, 6 Hill, 518.

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7. The evidence that Edson, nearly a year after the robbery, took one of the directors of the bank to see a person in relation to negotiating for the property, and the testimony of that director that he went at the instance of Edson, were immaterial. They were put in for the purpose of corroborating Edson in a collateral matter, and tended to prejudice the jury.

8. Whether or not the witness Hall sold the drawers, overalls and socks found at Northampton was immaterial, except as he could identify the defendants as the persons buying them. This he said he could not do. And he ought not to have been allowed to state that he had seen Dunlap somewhere before his arrest.

9. The same objection exists to the evidence admitted under this exception as to that under the 7th exception.

10. The admission of the signature of Edson on the hotel register was objectionable, because it merely corroborated his evidence of his own act.

11. The instruction asked for, in regard to the corroboration of the accomplice Edson, should have been given. *Rex* v. *Addis*, 6 Car. & P. 388. *Rex* v. *Webb*, 6 Car. & P. 595. *Rex* v. *Wilkes*, 7 Car. & P. 272. *Regina* v. *Farler*, 8 Car. & P. 106. *Regina* v. *Dyke*, 8 Car. & P. 261. *Commonwealth* v. *Bosworth*, 22 Pick. 397, 399. *Commonwealth* v. *O'Brien*, 12 Allen, 183, 184. *Commonwealth* v. *Larrabee*, 99 Mass. 413, 415. *Commonwealth* v. *Elliot*, 110 Mass. 104. *Commonwealth* v. *Snow*, 111 Mass. 411, 414. *State* v. *Wolcott*, 21 Conn. 272, 282. *Wright* v. *State*, 43 Texas, 170. *People* v. *Cloonan*, 50 Cal. 449. Rosc. Crim. Ev. 181. 1 Phil. Ev. (4th Am. ed.) 117. 1 Whart. Am. Crim. Law, § 789.

The instructions given did not meet the law applicable to the case, or give to the jury a clear idea of what was required in the way of corroboration. *State* v. *Williamson*, 42 Conn. 261. *Commonwealth* v. *Brooks*, 9 Gray, 299, 301.

C. R. Train, Attorney General, & *W. C. Loring*, Assistant Attorney General, for the Commonwealth.

MORTON, J. The questions raised in this case are numerous, and it will be convenient to consider them in the order in which they are stated in the bill of exceptions.

1. It is well settled in this Commonwealth that while, as a general rule, the district attorney or other prosecuting officer

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should conduct the trial of criminal cases, yet it is within the power of the court in particular cases, in which from peculiar circumstances the interests of public justice seem to require it, to appoint a counsellor of the court to assist the public officer in the trial. The rule and its limitations are stated in *Commonwealth* v. *Williams*, 2 Cush. 582. See also *Commonwealth* v. *Knapp*, 10 Pick. 477; *Commonwealth* v. *Gibbs*, 4 Gray, 146; *Commonwealth* v. *King*, 8 Gray, 501. The questions, whether in a particular case the circumstances are such as to justify such appointment, and whether the person, whom the district attorney requests the court to appoint, is a fit and proper person, are necessarily to be decided, in the first instance, by the presiding justice, and the decision of them is, to a large degree, within his sound discretion.

The case at bar was one of great complication and difficulty, and nothing appears in the bill of exceptions which shows any error in the decision of the presiding justice to appoint a suitable person to assist the district attorney; and the evidence was sufficient to justify him in finding that Mr. Gillett was acting without any assurance or expectation of compensation from any private person and was a suitable person to appoint. The appointment was made at the request of the district attorney, who retained the responsible management of the case, and we are of opinion that the defendants' exception thereto cannot be sustained.

2. The court properly ruled that it was not competent for the defendant Scott to prove what was his usual and natural voice, by using his voice in the court-room "to repeat something," when not under oath as a witness. His manner of speaking being in question, there was no way of determining whether he would use his voice in the court-room in his natural or in a constrained and simulated manner, the genuineness of the voice used not being supported by his oath. *King* v. *Donahue*, 110 Mass. 155.

3. It was clearly competent for the government to show the whole history of the robbery with which the defendants were charged, from the inception of the scheme by them to its final consummation. The evidence excepted to tends to show the beginning of the plot or scheme of this robbery in the summer

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of 1875. The fact of the general conspiracy, formed in 1873, was so connected with this scheme as to make it competent. It tended to explain and make intelligible the testimony of Edson as to the beginning of this scheme, as it accounts for the fact of his reporting to the defendants at Wilkesbarre, and furnishing them with the means of duplicating the keys of the vault lock.

The defendants' chief objection to this evidence is, that its admission violates the established rule that evidence which merely tends to prove that the defendants have committed other similar offences is inadmissible. But the evidence was competent as tending to prove the crime charged, and it is not rendered incompetent because it also tends to prove the commission of other crimes. *Commonwealth* v. *Choate*, 105 Mass. 451.

4. For the same reasons the testimony of Edson, as to the acts of the defendants and their co-conspirators in making preparations for carrying out the robbery, was competent.

The evidence tended to show, and the jury were justified in finding, that the plot or scheme of this robbery was formed in the summer of 1875, and that, though its execution was suspended during the months of October and November, it was never abandoned but resumed and conducted to a successful issue in the January following. All the acts of the defendants and their co-conspirators in the execution of the plot were therefore admissible.

5. There being evidence sufficient to be laid before the jury to prove the conspiracy, as to which the presiding justice was in the first instance to determine, it was competent for the government to put in evidence any acts of the several conspirators in furtherance of the common purpose of the conspiracy, either before or after the robbery was committed. *Commonwealth* v. *Brown*, 14 Gray, 419. Accordingly, Edson testified, without objection, that a few days after the robbery he met the defendants and Connor, who with Edson were the conspirators, in New York, on business connected with the robbery, and that the others then paid Edson $1,200 as his portion of the money stolen from the bank. But Edson was allowed to testify, against the defendants' objection, that the conspirators had previously arranged for calling such meetings by means of advertisements in the New York Herald, called "personals," and that this meet-

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ing was called by a "personal" inserted by him as follows "Idalia, F. N., meet me on the avenue Monday evening," and that Connor replied by a "personal" as follows: "Idalia, F. N., 8 sharp." To the testimony of Edson as to the "personals" and to the introduction of the paper containing them, the defendants excepted. But the insertion of these "personals" were acts of two of the conspirators in carrying out the purposes of the conspiracy and were thus competent against the defendants. The newspaper was the best evidence of their insertion, and was important to fix the date of the meeting.

6. For the same reasons the "personal" "Knox, come home," inserted in the New York Herald to warn Scott of danger in his visit to Northampton for the purpose of bringing to New York the securities stolen from the bank, was competent. It was an act of two of the conspirators, tending to show that the robbery had been committed in pursuance of the conspiracy, and it is immaterial whether Scott saw it or not. So, also, any declarations or admissions of Connor, having this tendency, were competent, he having been shown to be one of the conspirators. This being so, the defendants cannot complain of the order of the court that all such declarations of Connor which Edson had testified to should be considered as in the case subject to the defendants' exception, or that all should be withdrawn, or of the subsequent ruling and instruction that all such conversations should be disregarded by the jury. All the conversations being competent, the ruling was too favorable to the defendants, and they were not aggrieved thereby. It does not present the case, as argued by the defendants, where the presiding justice has admitted incompetent evidence, and afterwards directed it to be stricken out and disregarded; and we need not consider whether, if such had been the aspect of the case, justice would require that a new trial should be ordered.

7. For the reasons stated above, the fact that Williams, one of the directors of the bank, met Connor, and had negotiations with him relative to the return of the stolen property, was competent, and the fact that Edson took him to see Connor was admissible as a part of the transaction, and as tending to corroborate Edson's testimony that he and Connor were members of the conspiracy.

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8. The testimony of Hall, that about two days before the robbery he sold to two men in Springfield a pair of drawers and some socks like those left by the robbers in the cashier's house, was competent. There was evidence in the case tending to show that these two men were the defendants. The testimony of Hall was thus sufficiently connected with the defendants to entitle it to go to the jury, who alone were the judges of its weight.

9. The ninth exception is the same as the seventh, and is governed by the same principles.

10. Edson testified, without objection, that in August preceding the robbery he met the defendant Dunlap at Wilkesbarre for the purpose of conferring together in regard to the robbery. The government introduced, against the defendants' objection, the register of the Wyoming Valley House of Wilkesbarre, and Edson testified to his own signature thereon, under date of August 5, 1875, and that of Dunlap, under the assumed name of R. C. Hill. If there is doubt of the admissibility of this evidence upon other grounds, it was competent for the purpose of fixing the time when the interview took place.

11. The only remaining exception is that taken to the instructions of the court in regard to the corroboration of the witness Edson, and to the refusal to give the instruction requested, on this subject.

The government contended, and the bill of exceptions, though it does not purport to give all the evidence, shows, that there was evidence corroborating the part of the narration of Edson, which connected the defendants with the robbery, as well as the other parts.

We are of opinion that the court was not required, as matter of law, to give the instruction requested, and that the instructions given are not open to exception by the defendants.

It is well settled that a jury may convict upon the uncorroborated testimony of an accomplice, if it satisfies them beyond reasonable doubt of the guilt of the defendant. But it is the usual practice for the judge to advise the jury to acquit where there is no evidence other than the uncorroborated testimony of an accomplice.

If it can be held that this rule of practice, because of its uniformity, has acquired the force of a rule of law, still there is not

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the same uniformity in the practice as to the kind of corroboration required. The office of corroborative evidence is, by confirming the testimony of the accomplice in regard to matters which are not within the general knowledge but likely to be known only to those engaged in the crime, to induce the belief that he is to be generally credited in his statements. Its weight is for the jury, and there is no established rule of law which requires the judge, in a case where there is corroborative evidence of this character upon matters material to the issue, to advise the jury to acquit unless there is also corroboration of the statements connecting the defendant with the crime.

In *Commonwealth* v. *Bosworth*, 22 Pick. 397, the court say, as to the kind of corroboration required: "It is perfectly clear that it need not extend to the whole testimony; but, it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others. But what amounts to corroboration? We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue." In that case the evidence, held to be competent as corroborative, confirmed the accomplice as to a fact which did not tend to connect the defendant with the crime. Since this decision it has been usual to instruct the jury in substantial compliance with the rule stated therein, though the practice of different judges in the exercise of their discretion has varied. *Commonwealth* v. *Brooks*, 9 Gray, 299. *Commonwealth* v. *Price*, 10 Gray, 472. *Commonwealth* v. *O'Brien*, 12 Allen, 183. *Commonwealth* v. *Larrabee*, 99 Mass. 413. *Commonwealth* v. *Elliot*, 110 Mass. 104. *Commonwealth* v. *Snow*, 111 Mass. 411. See also *Regina* v. *Stubbs*, Dearsly, 555; *S. C.* 7 Cox C. C. 48; *State* v. *Wolcott*, 21 Conn. 272.

In the case at bar, there being corroborative evidence, the presiding justice was not called upon to advise the jury to acquit, but was required to submit the case to them; and we are of opinion that the instruction given, which called the attention of the jury to the suspicious character of the testimony of the accomplice, and advised them, in substance, that it was not safe to convict unless his testimony was corroborated in some portion which was material to the issue, is not open to exception by the defendants. ***Exceptions overruled.***

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COMMONWEALTH *vs.* ROBERT SCOTT & another.

Hampshire. October 5. — 19, 1877. ENDICOTT & LORD, JJ., absent.

If the defendant in a criminal case does not testify, the prosecuting attorney cannot be allowed to comment to the jury on the reasons given by the defendant's counsel for his not testifying, nor to give other reasons which the government contended really existed for his not testifying.

INDICTMENT against Robert Scott and James Dunlap, for breaking and entering the house of Laura B. Whittelsey, in the night time, with intent to commit larceny therein.

At the trial in the Superior Court, before *Bacon*, J., after twelve jurymen had been sworn, but before the jury had been empanelled, the judge allowed the government, against the defendants' objection and exception, to peremptorily challenge one of the jurors thus sworn. During the trial the defendants excepted to the admission of certain evidence introduced by the government, and to the exclusion of certain evidence offered by them, which it is unnecessary now to state.

Neither of the defendants testified at the trial. Their counsel, in his closing argument, alluded to this fact, and to the reasons for it, and stated that the fact that they did not testify should not raise any presumption against them, and made the following remarks: "What good would the testimony of these people be in proving their innocence? If guilty, would they confess it? If innocent, they are to be proved so by other lips than theirs. I have been endeavoring to discover the real facts in this case, and have never asked Scott, or Dunlap, or Mrs. Scott about it, and have never spoken to these men, nor heard their voices except as they were challenging the jury. They could add by their word nothing for me, either for or against them. I tell you, gentlemen, I never yet called a prisoner to the stand. I never have been through the farce, and I could not be here to ask that these men might have their shackles taken off and go upon the stand and declare their innocence to you. Their testimony would be utterly worthless. When Professor Webster was tried for the murder of Dr. Parkman, his two daughters went upon the stand, and delivered important testimony. The lawyers for the government asked no questions, but bowed

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them gracefully from the stand, because they knew that from the lips of those daughters, pleading for the life of their father, no testimony could come that would weigh with the jurors. And so, gentlemen, as I said before, I could not have these men unshackled to protest their innocence to you. If they went on the stand, what could they do but deny the testimony of Edson, that he met them on Lexington Avenue and 50th Street, or Madison Avenue, at Red Leary's, and Fort Hamilton, or that they came here?"

The prosecuting attorney, in his closing argument, was proceeding to discuss these reasons and to argue that other reasons than those suggested were the real reasons for not calling the defendants and Mrs. Scott as witnesses, when the counsel for the defendants interrupted, and asked the judge to rule that the fact that the defendants did not testify could not be commented on by the government. But the judge, "having first stated the law that the fact that the defendants did not testify did not create any presumption against them, ruled that, inasmuch as the matter had been referred to by the defendants' counsel, the prosecuting attorney had a right to comment on the reasons which the defendants' attorney gave for their not going upon the stand and testifying in their behalf, and also to give the reasons which the government contended really existed for their not testifying, and permitted the prosecuting attorney to proceed in his comments."

The jury returned a verdict of guilty; and the defendants alleged exceptions.

H. H. Bond, for the defendants.

C. R. Train, Attorney General, *& W. C. Loring*, Assistant Attorney General, for the Commonwealth.

GRAY, C. J. By our system of jurisprudence, the government has no right to interrogate a person accused of crime, or to compel him to testify, but must sustain its charge by independent evidence. The accused has the right to simply deny his guilt, and to rely upon the legal presumption of his innocence, until he is proved to be guilty. In accordance with this ancient rule of the common law, the Constitution of the Commonwealth declares that no subject shall be compelled to accuse or furnish evidence against himself. Declaration of Rights, art. 12. The statutes

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allowing persons charged with the commission of crimes or offences to testify in their own behalf were passed for their benefit and protection, and clearly recognize their constitutional privilege, by providing that their neglect or refusal to testify shall not create any presumption against them. Sts. 1866, *c.* 260; 1870, *c.* 393, § 1, *cl.* 3. And this court has decided that such silence cannot be taken into consideration by the jury in determining whether a defendant is or is not guilty, and that an equivocal instruction upon this matter entitles the defendant to a new trial; Chief Justice Chapman saying, "It is important that courts should carefully guard his constitutional right." *Commonwealth* v. *Harlow*, 110 Mass. 411.

As there is danger that the jury, knowing that the law now permits a defendant to testify, may draw inferences against him from his omission so to do, his counsel may properly, in addressing the jury, insist and enlarge upon his constitutional and legal right in this respect. When the counsel for the defendants in the present case went farther, and referred to his own opinion and practice upon the subject, and to what he supposed to have taken place in other cases, he might well have been checked by the court. But the absolute exemption, secured to the defendants by the Constitution and laws, from being compelled to testify, and from having their omission to do so used in any way to their detriment, could not be affected by superfluous or irregular suggestions of their counsel in the heat of argument. That exemption could only be waived by each defendant's own election to avail himself of the statute, and to go upon the stand as a witness. *Commonwealth* v. *Nichols*, 114 Mass. 285.

The course of the closing argument for the prosecution tended to persuade the jury that the omission of the defendants to testify implied an admission or a consciousness of the crime charged; and the presiding judge, in permitting such a course of argument, against the objection of the defendants, and in ruling that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not going upon the stand and testifying in their behalf, and also to give the reasons which the government contended really existed for their not testifying, committed an error which was mani-

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festly prejudicial to the defendants, and which obliges this court to set aside the verdict and order a new trial.

This renders it unnecessary to consider the other questions presented by the bill of exceptions. Some of them are like those which have been passed upon in the other case against the same defendants, *ante*, 222. And the remaining questions of evidence, as well as that relating to a peremptory challenge by the Commonwealth of a juror who had been sworn, may not be presented again in the same form. *Exceptions sustained.*

COMMONWEALTH *vs.* LUKE K. BLAIR & another.

Hampshire. October 5. — 19, 1877. ENDICOTT & LORD, JJ., absent.

On the trial of an indictment for procuring an abortion, there was evidence of an arrangement to meet the defendant and bring him to the place where the alleged crime was committed; and the district attorney argued that the arrangement was made to bring the defendant for the purpose of procuring the abortion. *Held*, that, if there was direct evidence of his guilt from other circumstances in the case, evidence offered by the defendant to show that the arrangement was for another purpose was immaterial.

INDICTMENT under the Gen. Sts. *c.* 165, § 9, against Luke K. Blair for procuring an abortion upon Mary M. Wilson, on December 5, 1876, by reason of which she died; and against George Wilson, as an accessory before the fact. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

The defendant Blair formerly resided in Pelham, where he had property, but at the time in question he resided in Holyoke. The defendant Wilson, the husband of Mary M. Wilson, lived in Pelham. It appeared that Blair came to the house of Wilson on December 4, 1876, in the afternoon, and stayed there until the following afternoon. There was evidence that the defendant Wilson arranged on December 1 to meet the defendant Blair at Amherst on December 4, and to bring him to Pelham, which was done; and the district attorney contended both in opening the case to the jury and in his argument, that the arrange-

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ment was made on December 1, by the defendants, that Blair should come to Pelham, at the time mentioned, to procure the abortion.

The defendants introduced evidence tending to show that Blair had some buildings burned in Pelham, and that he was in Pelham on December 1, for the first time after the fire, and, as he was passing the house of Wilson, he saw Wilson in his door yard in conversation with one Peck; that he stopped and had a conversation with him, but did not get out of his carriage. The government did not rest the case against Blair upon the fact that a plan had been formed and agreed upon between the defendants, before Blair came to the house of Wilson, to procure an abortion upon Mrs. Wilson, but that, while Wilson was away, Blair and Mrs. Wilson came out from the bed-room and soon after Mrs. Wilson began to be sick, and the government contended that there was evidence other than above stated on which the jury might convict Blair, though they should acquit Wilson.

Wilson carried Blair to Amherst, on his return to Holyoke, towards night on December 5, having sold his horses with which he was to take Blair to Holyoke; and the defendant offered to show, by the evidence of Blair, Wilson and Peck, what was said by Blair and Wilson, and the arrangement which was made about Blair's coming to Pelham on December 4, and also to show the object of his visit to Pelham, and the arrangement which was made by Wilson to carry Blair from Pelham to Holyoke with a pair of horses belonging to Wilson, which Blair, at the request of Wilson, had talked with one Joseph Martin about buying. The defendant also offered to show by the evidence of Martin that Blair arranged with him to have Wilson come down with the horses on December 5, for him to look at them with a view of buying.

The judge excluded the above evidence, but allowed the defendants to testify that no arrangement was made by them that Blair should go to Pelham for the purpose of procuring an abortion. Both Blair and Wilson were allowed to testify, so far as they chose, to all that was done by them and each of them during the time that Blair was at the house of Wilson, and also that, when Blair came to the house of Wilson on December 4, he and Wilson expected he was going to spend the night with a

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neighbor by the name of Stratton. And the defendant Blair was allowed to show that an arrangement had been made with that neighbor to stay over night with him.

The judge instructed the jury that, if an abortion was procured by Blair, and the defendant Wilson brought him to his house for the purpose of having an abortion produced, they should find Wilson guilty as an accessory before the fact. The jury acquitted Wilson, and returned a verdict of guilty against Blair; and he alleged exceptions.

H. H. Bond, for the defendant Blair.

W. C. Loring, Assistant Attorney General, for the Commonwealth.

AMES, J. The evidence that was excluded was offered to meet the argument of the district attorney that the defendants met for an unlawful purpose, and not in reply to any evidence on the part of the prosecution as to the purpose of the meeting. The indictment against Blair was not for going to Wilson's house for an unlawful purpose, but for perpetrating a crime when there. If there was direct evidence of his guilt, derived from other circumstances in the case, it would not be controlled or explained by proof that his original purpose in going there was in truth as harmless as he claims that it was. We cannot see, therefore, that he suffered any wrong in the exclusion of the evidence offered *Commonwealth* v. *Bowers*, 121 Mass. 45.

Exceptions overruled.

COMMONWEALTH *vs.* JOHN POWERS.

Worcester. October 5. — 6, 1877. ENDICOTT & LORD, JJ., absent.

At the trial of a complaint for keeping intoxicating liquors on a certain day with intent to sell the same, in violation of law, evidence of the condition of the room where the liquors were alleged to be kept, as to appointments and fixtures, at eight o'clock in the morning of the next day, is admissible.

COMPLAINT to the Central District Court of Worcester charging the defendant with keeping intoxicating liquors on April 25, 1877, with intent to sell the same, in violation of law.

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Trial on appeal in the Superior Court, before *Allen*, J., who allowed a bill of exceptions, in substance as follows:

The government offered evidence to show the condition of the place in which the liquors were alleged to be kept, as to appointments and fixtures, at about eight o'clock in the morning of April 26, 1877. The judge admitted the evidence against the defendant's objection. The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Hopkins, for the defendant.

W. C. Loring, Assistant Attorney General, for the Commonwealth.

BY THE COURT. Evidence of the condition of the room, as to appointments and fixtures, at eight o'clock in the morning of one day, was competent to be considered by the jury upon the question whether it was in the same condition on the day before. The only exception reserved is to the admissibility of this evidence, and to its sufficiency without other evidence tending to connect the defendant with the offence charged; and the bill of exceptions does not show that such other evidence was not introduced. *Exceptions overruled.*

COMMONWEALTH *vs.* WILLIAM BRAHANY.

Worcester. October 5. — 22, 1877. ENDICOTT & LORD, JJ., absent.

Under the St. of 1867, c. 130, § 1, a license to keep a dog, which is described therein only as a "male dog" is insufficient.

Under the St. of 1867, c. 130, § 1, a license to keep a "yellow and white" dog named "Dime," will not authorize the keeping of a black Newfoundland dog named "Nigg."

COMPLAINT to the Central District Court of Worcester, charging the defendant with keeping a dog between May 1, 1876, and September 4, 1876, not "registered, numbered, described and licensed according to law."

At the trial in the Superior Court, on appeal, before *Colburn*, J., the defendant sought to justify under a license issued by the town clerk of Millbury, on May 24, 1876, by which "permis-

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sion is given to Daniel Braney to keep the dog described in the margin, for one year from May 1, 1877." The margin of the license contained the following words and figures: "Dog License No. 185. Name and Description of Dog. Name: Dime. Sex: Male. Color: Yellow and White. Breed: ———. One year old."

The evidence tended to show that the dog which the defendant kept was a black Newfoundland dog, which he procured in January, 1876, when the dog was nine weeks old, and which was always called "Nigg;" and that the license was procured by the defendant by sending his son Daniel, who lived with him, with the necessary fee to the town clerk's office. The judge ruled that the mistake in writing 1877 for 1876 in the license was immaterial.

The defendant requested the judge to rule and instruct the jury that the license produced would authorize the defendant to keep the dog described by the evidence, if the jury were satisfied that the defendant, in good faith, intending to license the dog described by the evidence, sent his agent with the proper fee to register the dog, although the agent may have misdescribed him; and that if the license produced was issued to the defendant with the intention that it should authorize the keeping of the dog described by the evidence, the misdescription of the animal and the misnomer of the license would not invalidate the license.

The judge refused so to rule, but instructed the jury, that, as it appeared that the defendant and his son Daniel lived together, a license in the name of Daniel would protect the defendant, though the defendant was the owner of the dog; that the license produced, with the description, would not justify the keeping of a black Newfoundland dog called "Nigg," and that, if the description of the dog kept did not, in some respects at least, correspond with the description in the license, the license was no protection.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Hopkins, for the defendant.

W. C. Loring, Assistant Attorney General, for the Commonwealth.

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SOULE, J. The chief purpose of the statutes regulating the keeping of dogs is to prevent sudden and dangerous assaults upon persons, the worrying, wounding and killing of neat cattle, sheep and lambs, and other injuries occasioned by dogs, as well as to afford means for ascertaining the owners and making them liable for the mischief done by their dogs, and for ridding society of a nuisance, by providing for the killing of unlicensed dogs. *Blair* v. *Forehand*, 100 Mass. 136. *Cummings* v. *Perham*, 1 Met. 555. In order that the statute should not fail to accomplish this purpose in full, it is important that the description which the owner is required, by the St. of 1867, *c.* 130, § 1, to give to the clerk of the town, should be so definite and accurate as to furnish the means of identifying the dog which the license protects. As the statute requires the owner or keeper to cause his dog to be described, as well as licensed and registered, it would not be complied with by a license to keep a "male dog," without any description as to color, marks, name or other characteristics by which the dog intended could be distinguished from other male dogs. Still less can a license to keep a yellow and white dog named "Dime," give authority to keep a black Newfoundland dog named "Nigg." To hold otherwise would be to make the statute nugatory, so far as it requires the dog to be described, and would make it necessary to hold that a license for a spaniel or a lapdog would authorize the keeping of a mastiff or a bloodhound. It was the duty of the owner of the dog, whether acting in person or by an agent, to see that the animal was properly described to the town clerk, and in the license, so that no difficulty should arise in identifying it. The defendant was not entitled to the rulings which were refused by the court, and the rulings given were sufficiently favorable to him.

Exceptions overruled.

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COMMONWEALTH *vs.* HENRY BRIGHAM.

Worcester. October 5. — 22, 1877. ENDICOTT & LORD, JJ., absent.

Evidence that an officer, who had attached and left without objection certain property in a building, which he kept locked and occasionally visited to look after the property, delivered one of the keys of the same to the owner of other property stored therein, who was in no way connected with the defendant named in the writ on which the property was attached, and who did not carry on business in or otherwise occupy the building, does not, as matter of law, show an abandonment of the attachment.

An instruction that certain evidence was sufficient to authorize the jury to find a certain fact, made in response to a request by a party for a ruling that it was insufficient, is not in violation of the Gen. Sts. *c.* 115, § 5, prohibiting courts from charging juries with respect to matters of fact.

INDICTMENT for breaking and entering a certain building with intent to commit a larceny of goods therein belonging to one Keene.

At the trial in the Superior Court, before *Allen*, J., the government offered evidence that Keene was a deputy sheriff, and put in evidence a writ, by the return upon which it appeared that Keene attached the goods in question in the building, which was a mill, as the property of one Godfrey and one Marden.

It also appeared that Keene made the attachment by locking the door of the mill and taking into his custody two keys of the outside door; that the property was never put in charge of a keeper; and that Keene only went to the mill occasionally to look after the property, but continued to do so till after the time of the alleged larceny. It also appeared that, at the time of the attachment, the mill and certain machinery and tools therein were subject to a mortgage as personal property, and were subsequently sold under a power of sale to one Shippee; that, at or about the time of the sale, Keene delivered to Shippee one of the keys, and Shippee entered the mill occasionally and as often as he had occasion to do so, but did not occupy it for carrying on any business. The defendants named in said writ were the general owners of the property alleged to have been stolen, and the writ was duly entered in court, and the action was pending at the time of the alleged larceny. Keene testified that he occupied the mill until after the time of the alleged larceny as a storehouse for keeping the attached property, among which was

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the property in question, and that his occupation was exclusive with the exception of the occupation by Shippee.

The defendant contended and asked the judge to rule that the delivery of one of the keys to Shippee under the circumstances would be an abandonment of his attachment, and that the government had failed to prove any sufficient ownership in Keene at the time of the alleged larceny.

The judge declined so to rule, but ruled that the evidence was sufficient to authorize the jury to find that the alleged ownership of the property by Keene had been proved.

The jury returned a verdict of guilty of simple larceny; and the defendant alleged exceptions.

T. G. Kent, for the defendant. 1. The alleged owner of the stolen property had no title to it at the time of the larceny. His title depended upon the preservation of his attachment. An officer must have the actual possession and custody of property attached. *Lane* v. *Jackson*, 5 Mass. 157, 163. It is true that putting in a keeper is sufficient; *Train* v. *Wellington*, 12 Mass. 495; so, if the officer locks up the property. *Denny* v. *Warren*, 16 Mass. 420. *Gordon* v. *Jenney*, 16 Mass. 465, 469. But, in such a case, his possession and custody must be exclusive. He cannot make a valid attachment by taking away one key and leaving another in the door. By so doing, he abandons the attachment. *Bagley* v. *White*, 4 Pick. 395. *Carrington* v. *Smith*, 8 Pick. 419. *Sanderson* v. *Edwards*, 16 Pick 144. As matter of law, therefore, the uncontested facts in this case showed an abandonment of the attachment, and the instruction requested should have been given.

2. If the question whether the officer had abandoned the attachment was one of fact for the jury, the ruling, "that the evidence was sufficient to authorize the jury to find that the alleged ownership of the property by Keene had been proved," was an expression of opinion as to the proof of ownership, and was in violation of the Gen. Sts. *c.* 115, § 5. *Commonwealth* v. *Barry*, 9 Allen, 276.

W. C. Loring, Assistant Attorney General, for the Commonwealth.

COLT, J. In the prosecution of offences relating to or affecting real or personal property, it is sufficient to prove that the

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person alleged to be the owner had actual or constructive possession, or had general or special property in the whole or any part thereof. Gen. Sts. *c.* 172, § 12.

At the time of the alleged larceny, the attaching officer had special property in and possession of the goods stolen, and was correctly described as the owner, unless before that time he had lost his title and possession by an abandonment of his attachment. Whether there has been in any given case an abandonment of an existing attachment, is ordinarily a question of fact to be submitted to the jury with proper instructions. *Gordon* v. *Jenney*, 16 Mass. 465, 469. In the case at bar, the facts relied on do not, as matter of law, show an abandonment. The court properly declined to rule that the delivery of one of the keys of the building in which the property was stored, to the owner of other personal property stored in the same building, would be such abandonment. The goods attached remained without objection in the mill where they were attached, but the building was kept locked and the keys were taken by the officer, who occasionally visited the place to look after the property. He afterwards delivered one of the keys to an owner of part of the machinery in the mill, who was in no way connected with the defendants named in the writ on which the property was attached, and who did not carry on business in or otherwise occupy the mill. There was evidence that the officer occupied the mill as a storehouse at the time of the larceny, and that his occupation was exclusive except as above stated.

If the delivery of one of the keys of the mill to a third party under these circumstances had any tendency to show an abandonment, it is enough that the circumstance was submitted to the jury with the other evidence bearing on the question, with instructions which do not appear to have been objected to. *Train* v. *Wellington*, 12 Mass. 495. *Bagley* v. *White*, 4 Pick. 395. *Boynton* v. *Warren*, 99 Mass. 172.

The ruling of the court, "that the evidence was sufficient to authorize the jury to find that the alleged ownership of the property by Keene had been proved," made in direct response to a request by the defendant for a contrary ruling, cannot be treated by him as a violation of the statute which forbids the court to charge the jury with respect to matters of fact; with

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equal propriety it might be claimed that a ruling in favor of the admissibility of any specific item of evidence was such violation. The statute cannot receive such an unreasonable interpretation. Gen. Sts. *c.* 115, § 5. *Exceptions overruled.*

COMMONWEALTH *vs.* MANUEL LEWIS.

Bristol. October 23, 1877. LORD & SOULE, JJ., absent.

Objections to a complaint, that it does not in terms refer to the statute under which it was brought, nor negative its exceptions, are formal, and cannot, under the St. of 1864, c. 250, § 2, be taken, for the first time, in the Superior Court on appeal.

COMPLAINT to the Third District Court of Bristol, charging that the defendant "unlawfully did keep intoxicating liquor with intent unlawfully to sell the same in this Commonwealth, he the said Lewis not being then and there authorized to sell the same in this Commonwealth by any legal authority whatever." In the Superior Court, on appeal, before the jury were empanelled, the defendant for the first time moved to dismiss the complaint for the following reasons:

"1. Because it is nowhere alleged in said complaint that the defendant was not authorized to keep spirituous or intoxicating liquor for sale, under any provision of the St. of 1875, *c.* 99.

"2. Because said complaint does not allege, as it should, that the defendant was not authorized to keep intoxicating liquor for sale."

Pitman, J., overruled the motion. The case was then tried, and the jury returned a verdict of guilty. The defendant alleged exceptions.

H. M. Knowlton, for the defendant.

W. C. Loring, Assistant Attorney General, for the Commonwealth, was not called upon.

BY THE COURT. The motion to dismiss was for matter of form, and not of substance, and could not be made for the first time in the Superior Court on appeal. St. 1864, *c.* 250, § 2. *Green & Simpson* v. *Commonwealth*, 111 Mass. 417. *Commonwealth* v. *Legassy*, 113 Mass. 10. *Exceptions overruled.*

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COMMONWEALTH *vs.* SIMON O'KEEFE.

Bristol. October 23, 1877. LORD & SOULE, JJ., absent.

A complaint under the St. of 1875, c. 99, alleged that the defendant "did keep intoxicating liquors with intent to sell the same in this Commonwealth," he "not being then or there appointed, authorized or licensed to sell the same in this Commonwealth for any purpose nor by any legal authority whatsoever." *Held*, that the defects were formal, and could not be taken for the first time in the Superior Court.

COMPLAINT to the First District Court of Bristol, alleging that the defendant, on February 16, 1877, "did keep intoxicating liquors with intent to sell the same in this Commonwealth, he the said Simon O'Keefe not being then or there appointed, authorized or licensed to sell the same in this Commonwealth for any purpose nor by any legal authority whatsoever."

In the Superior Court, on appeal, after a verdict of guilty, the defendant moved in arrest of judgment for the following reasons: That the complaint sets forth no offence, either in form or substance, over which any court in this Commonwealth has jurisdiction; that the offence, if any, is one made punishable under the St. of 1869, *c.* 415, §§ 31, 36, which was repealed by the St. of 1875, *c.* 99, § 22; that there is now no such offence known to the law as "keeping intoxicating liquor with intent to sell" under any circumstances, but the offences are confined, under the St. of 1875, *c.* 99, § 1, to such persons as "shall sell, or expose, or keep for sale;" that the negative averment in the complaint negatives only a present right to sell, but not the right to keep with intent to sell, — neither does it aver that he unlawfully kept the liquor, nor that he had an intent unlawfully to sell; and that a future intent to sell may be to sell lawfully.

Brigham, C. J., overruled the motion; and the defendant alleged exceptions.

J. Brown, for the defendant, contended that, under the St. of 1875, *c.* 99, it was no offence to keep intoxicating liquors with intent to sell the same; that there was no averment of any unlawful intent; that, no court having jurisdiction of the alleged offence, a motion in arrest of judgment would lie; and cited *Melody* v. *Reab*, 4 Mass. 471, 473; *Cleaveland* v. *Norton*, 6 Cush.

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380, 383; *Hopkins* v. *Commonwealth*, 3 Met. 460, 462; *Chamberlain* v. *Hoogs*, 1 Gray, 172.

W. C. Loring, Assistant Attorney General, for the Commonwealth.

By the Court. This case comes within the same rule as *Commonwealth* v. *Lewis*, *ante*, 251, and the cases there cited. The charge of keeping intoxicating liquors with intent to sell them without authority must have been understood by the defendant as alleging that he kept them for sale, in violation of the St. of 1875, *c.* 99, which was the only statute in force at the time in question, and the defect is mere matter of form.

Exceptions overruled.

Commonwealth *vs.* John G. Taber.

Bristol. October 23, 1877. Lord & Soule, JJ., absent.

If a judge of a district court holds, at the same time, the office of mayor of a city within the district, the question whether he is disqualified to act as judge, by reason of incompatibility in the two offices cannot be determined upon an appeal taken by a person whom he has tried and found guilty upon a complaint originally made returnable before him.

Complaint to the Third District Court of Bristol, charging the defendant with keeping intoxicating liquors with intent to sell the same, in violation of law. In the Superior Court, on appeal, before the jury were empanelled, the defendant filed a plea in bar, alleging that the complaint was received, heard and tried before Alanson Borden, esquire, who at the time of said trial was then and there mayor of the city of New Bedford, and was then and there the judge of the Third District Court of Bristol; and that, by the Constitution and laws of the Commonwealth and the ordinances of the city of New Bedford, Borden was not a proper person as judge to hear and determine the case.

The district attorney demurred to the plea, and the demurrer was sustained, and the plea adjudged. From this judgment, after being tried on the general issue, and found guilty, appealed.

E. L. Barney, for the defendant.

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W. C. Loring, Assistant Attorney General, for the Commonwealth, was not called upon.

GRAY, C. J. The competency of the magistrate, before whom this prosecution was commenced, is not objected to on account of any disqualification by reason of personal interest in the cause, as in *Richardson* v. *Welcome*, 6 Cush. 331, but upon the ground that, holding the executive office of mayor of the city of New Bedford, he could not at the same time exercise judicial power as a judge within the same territory. As, upon the allegations of the plea, he was at least a judge *de facto*, his jurisdiction could not be controverted upon this ground, nor the question whether the two offices were incompatible be tried, in a proceeding to which he was not a party. *Milward* v. *Thatcher*, 2 T. R. 81, 87. *McGregor* v. *Balch*, 14 Vt. 428. *Coolidge* v. *Brigham*, 1 Allen, 333. *Sheehan's case*, 122 Mass. 445.

Judgment affirmed.

LEVI L. BROWN & others *vs.* RANSOM B. DEAN, administrator.

Berkshire. Sept. 11. — Oct. 18, 1877. ENDICOTT & LORD, JJ., absent.

Under the Gen. Sts. c. 127, § 1, an action of tort against a mill-owner, who obstructs the flow of water in a stream by maintaining his dam at too great a height, to the injury of another mill-owner, survives.

A mill-owner, who partially obstructs the flow of water in a stream from his own mill, is not thereby prevented from maintaining an action against another mill-owner, lower down the same stream, for the injury caused by an additional obstruction in consequence of the latter maintaining his dam at too great a height, whereby the water is set back; and the doctrine of contributory negligence does not apply.

In an action by A., a mill-owner, against B., another mill-owner, lower down the same stream, for maintaining his dam at too great a height, whereby the water was set back, A. offered evidence tending to show that he had the right by deed to discharge the water from his mill through a raceway running through the land of B. into the river below. B. contended that the raceway was a natural channel of the river, which divided at a point above A.'s mill, and formed an island, upon which B.'s mill was situated; that A.'s mill discharged the water into this natural stream on his own land; and that the rights of both parties were to be construed and determined accordingly. *Held*, that B. had no ground of exception to a ruling, based on his theory, that A. had the right to pass the water discharged from his premises into the river below.

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No exception lies to the refusal of a judge, at the close of his charge to the jury, to give an instruction which is covered by the instructions already given.

In an action against a mill-owner to recover damages caused by his maintaining his dam at too great a height, whereby the water was set back, the jury returned a verdict with nominal damages for the plaintiff, and a direction that the defendant should reduce his dam to a certain level, which latter the judge ordered to be erased, and, several jurors dissenting from the verdict thus amended, directed them to retire, and, if they agreed, return a sealed verdict in the morning. The jury returned a verdict with substantial damages for the plaintiff. *Held*, that the defendant had no ground of exception.

TORT for the obstruction, from October 5, 1865, to September 1, 1872, of the machinery of the plaintiffs' mills, in Adams, by water set back by a dam built by the defendant's intestate, Horatio N. Dean, lower on the stream. Writ dated March 3, 1875. Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions in substance as follows:

The plaintiffs put in evidence tending to show that their mills and dam were situated on land formerly owned in common by John Bucklin and Benjamin Read, and that, while they so owned it, they built a dam across the Hoosac River, and also erected mills, the raceway from which ran through the adjoining land of Read to the river below; that in 1784 Read conveyed one half of the mills, mill lot and dam, "with the other appurtenances relative to the same," to Benjamin Russell, who the same year became the owner of the other half; and from whom the plaintiffs derived their title by various mesne conveyances; that the adjoining lot, owned by Read, and through which the raceway ran, is that owned by the defendant's intestate; that the raceway had, since 1784, been used in connection with the mills on their land; and that the dam erected by the defendant's intestate was built over this raceway.

The plaintiffs also put in evidence tending to show that those under whom they claimed had erected mills substantially on the site of their present mills, before the erection of any dam on the premises of the defendant's intestate; and that the dam complained of was built by him in 1860; that, shortly after this dam was built, there was backwater on the plaintiffs' wheels, as there had never before been; and the plaintiffs contended that it was caused by the dam.

The defendant contended, and offered evidence tending to show, that the dam erected by his intestate was on a natural

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stream, a branch or channel of the Hoosac River, which divided at a point near the plaintiffs' dam, forming an island, on which the mills of the defendant's intestate were situated, and into which natural stream the water from the plaintiffs' mills discharged, on their own land, and that the rights given by the deeds under which the plaintiffs claimed, and also the rights of the defendant, were to be construed and determined accordingly.

It appeared that, after the erection of the mills by the plaintiffs' grantors, and the construction or adoption of their raceway about 1810, a mill and a dam, called the old fulling-mill dam, were erected on premises afterwards owned by the defendant's intestate, and that the title to this mill and dam had been acquired by him before the erection of the dam complained of, which he built at a point on the stream about one and one half rods below the old fulling-mill dam.

There was evidence tending to show that the old fulling-mill dam had a permanent planking which set back the water to the height of a certain overflow or waste-way some rods above; that, thus constructed and used, it did not set back the water upon or otherwise injure the mills above, as they were when it was erected, and that the dam complained of was of no greater height than the permanent planking and overflow or waste-way of the old fulling-mill dam; that the plaintiffs, since the erection of the fulling-mill dam, had materially lowered the stream or raceway at a point between their wheels and the fulling-mill dam, and had also lowered their wheel-pits and wheels; and that no period of twenty consecutive years had elapsed since the erection of the old fulling-mill dam, when the use of the plaintiffs' wheels had not been obstructed by water set back by means of loose planks or flash-boards put on the old fulling-mill dam above its permanent planking, or on some other dam erected by the defendant's intestate, or those under whom he claimed, on the premises owned by him when he built the dam complained of.

There was also evidence tending to show that the water, after leaving the plaintiffs' wheels, had to pass through an archway above the premises of the defendant's intestate, about fifty-six feet long and only fourteen feet wide, and that the quantity of water discharged from the plaintiffs' wheels was so great that it could not be discharged through this archway without being

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therein at least two feet in depth, and without setting back water upon his wheels to at least that amount, when the wheels are in operation under the ordinary head and gates, and that if there was a sheer descent at the lower mouth of said archway, it would not reduce the depth of water in the arch, or on the plaintiffs' wheels, and that, if the dam complained of should be entirely taken down, it would not lessen the depth of water in this archway, or on the plaintiffs' wheels when in ordinary operation, and that, if the plaintiffs' wheels had been hindered or obstructed by backwater, such backwater was caused wholly or in part by the archway being too narrow, and not sufficiently deepened to pass the volume of water discharged by the plaintiffs' wheels when in use, without causing backwater therefrom. There was no evidence that the defendant's intestate, between October 5, 1865, and September 1, 1872, did any act whatever to his dam or waterworks, except to use them, as constructed in 1860, for the use of his tannery.

The defendant asked the judge to instruct the jury that unless the defendant's intestate had done something more than to simply use a dam erected before the time complained of in the plaintiffs' writ, the cause of action would not survive against his administrator; but the judge declined so to rule.

The defendant also asked the judge to instruct the jury that, if they believed that the backwater on the plaintiffs' wheels was caused in part by the wrongful acts of the defendant's intestate, and in part by the lowering of the plaintiffs' wheel-pits, and in part by the narrowness of the archway, then they had contributed to their own injury, and could not recover against the defendant; but the judge declined so to instruct the jury.

The judge then gave the jury the following instructions, among others not now necessary to state: "The proprietor who first lawfully erects his dam across a stream to create a fall by means of which he may operate his mill has a right afterwards to maintain it against all other proprietors, both above and below him, and to this extent priority of occupancy gives priority of title. That is, the first occupant can flow back on the land of others above his dam, paying flowing damages, and he has a right to have the water pass off freely from his wheel, and the owner below has no right to flow back on his wheel.

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"The defendant contends that the stream or channel, across which the dam was erected, was a branch of the Hoosac River that divided above the plaintiffs' mills. Assuming this is so, the lower proprietor of a mill may maintain a dam, or raise it, so as to use all the unappropriated water-power of the stream; he may do so, if it causes the water of his pond to set back into the raceway of the mill above, provided it does not obstruct the upper mill-owner's wheel, or otherwise injure his mill. After each party has made an appropriation of the water-power he is entitled to, neither can make any changes which shall injuriously affect the rights of the other. The defendant contends that the backwater arises from other causes than the dam, and from causes for which he is not responsible, namely, that it is occasioned by the greater quantity of water which is discharged upon the plaintiffs' wheels, which fills the wheel-pits and prevents a discharge as formerly, and causes it to set back, or not pass off freely; that the archway is not sufficient for the large discharge of water now passing off; that since the appropriation by the defendant's intestate of the water rights below the plaintiffs' dam, the plaintiffs have dug down and lowered their wheels so as to cause the water to set back on the present wheel, when it did not before. If the plaintiffs, in lowering their wheels, digging out their wheel-pit or raceway, or use of greater amount of water beyond what they were authorized by their deed from Read, and, as occupants of the first privilege, have caused the water to obstruct their wheels, or if others than the defendant's intestate, as the builder of the archway, have done it, of course the defendant is not liable for the backwater arising from these causes. The plaintiffs' wheels were not put in till four years ago, and they contend that there was backwater on the old one, and that the volume of water does not block up the archway; that the clearing out of the raceway has been of stones and dirt falling in. On all these points you will consider the conflicting testimony, and decide what are the facts.

"The defendant also contends that, if you should find that the dam caused the water to set back upon the wheels of the plaintiffs, his intestate did not raise his dam any higher than he had a right to, and his acts were not wrongful. The titles and rights to the tannery and fulling-mill dams had both vested in the de-

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fendant's intestate. The fulling-mill title did not pass to Dean till about 1840. It was built about 1811, and the defendant contends that the fulling-mill dam was as high as the present dam, and that the height of the tannery dam was as high; that it had been maintained to that height for such a length of time, and under such circumstances as to give a right forever to keep it as high. In other words, that, by adverse use or possession of twenty years, his intestate and those under whom he claimed had acquired the right. It is important you should clearly understand what is necessary to the acquirement of a title or right in this way. The possession or user must be adverse, peaceable, uninterrupted, with a claim of right notorious and with the knowledge of the other party, and continued in this manner for twenty years; all these requisites must unite. If the use was permissive, or without a claim of a right, or if the right was claimed, but resisted or interrupted at any time in the twenty successive years, then no right is gained. If, by such an adverse user and possession as the law requires in order that a title or right shall be acquired in this mode, the defendant's intestate had gained the right to maintain his dam as high as it now is, the plaintiffs cannot recover. But if he had not gained it, and, by maintaining it, he caused the water to set back on the plaintiffs' wheels, placed no lower than the owner of the first wheel placed them, or that the plaintiffs, or those under whom they claim, have gained an adverse right in the same way in which, as already said, adverse rights above could be gained, then the defendant is liable for the damage caused by the backwater set back on the wheels by the dam.

"If you find that the backwater on the wheels of the plaintiffs is caused, a part of it, by the wrongful acts of the defendant's intestate, and partly by other causes, as the lowering of the wheel or narrowness of arches, &c., or the increased volume of water discharged by the plaintiffs on the wheel, the defendant is liable only for such portions of the damage as arose from the backwater which his intestate wrongfully caused, and you can only find for the plaintiffs for the amount which, upon the evidence, — the burden being upon the plaintiffs to satisfy you as to the amount, — you are satisfied arose from the wrongful acts of the defendant's intestate, and not from any other cause."

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After these instructions, and before the jury retired, the defendant asked the judge to rule that if the old fulling-mill dam, at the height of its permanent boarding, did not set back water to the damage of the plaintiffs' mills, or otherwise injure such mills, then the defendant's intestate had a right to maintain a dam at that height; and if the jury find that the present dam of the defendant is at no greater height than the old fulling-mill dam with its permanent boarding, then the defendant's intestate had a right so to maintain the present dam under the appropriation made by the erection of the old fulling-mill dam to that height. But the judge declined so to rule.

The jury, after a deliberation of several hours, returned into court, and, in answer to the inquiry by the clerk, whether they had agreed on a verdict, the foreman replied, "Yes," and handed to the clerk a paper, on which was the following, signed by the foreman: "The jury find for the plaintiffs, and assess damages in the sum of one dollar. The defendant shall reduce his dam to a level with the crest of the old tannery dam." The clerk passed this paper to the judge, who stated to the foreman that the jury had no authority to return a verdict in that form, and directed him to erase in the verdict the following words: "The defendant shall reduce his dam to a level with the crest of the old tannery dam." The clerk then read to the jury the verdict as it was after this erasure, and, by the direction of the judge, inquired of the jurors if the verdict as read was their verdict; only three or four of the jurors assented, the others dissenting therefrom. The judge then stated to the jury that, as it appeared that they had not agreed on a verdict, they would retire for further consultation, which they did, the judge giving directions that, if they agreed, they might seal up their verdict and return it in the morning. The counsel of both parties were present and neither assented nor excepted to the order of the judge. The jury, after a further deliberation of several hours, agreed, and the next morning returned a sealed verdict for the plaintiffs, with damages assessed at $862.83, which verdict was duly affirmed by them and rendered. After the return of the jury into court the next morning, the counsel of the defendant, prior to the opening of the verdict, objected to the reception of any verdict, and reserved his right of exception to the same being received and affirmed.

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The defendant alleged exceptions to so much of the charge to the jury as related to the right of the plaintiffs to have the water discharged from their premises into the river below; to so much thereof as related to the causing of the alleged damage partly by the acts of the defendant's intestate, and partly by other causes; to the refusals to rule as requested; and to the orders as to the verdict.

T. P. Pingree & J. M. Barker, (*F. O. Sayles* with them,) for the defendant. 1. The case falls within the general rule that actions of tort do not survive. *Holmes* v. *Moore*, 5 Pick. 257. The exception contained in the Gen. Sts. *c.* 127, § 1, that actions "for damage done to real or personal estate" shall survive, does not cover the case at bar. The exception was intended to include only those cases where injury is occasioned to property by the direct wrongful act of the party, and not where it results incidentally or collaterally therefrom. *Cutting* v. *Tower*, 14 Gray, 183. There was no evidence that the defendant's intestate, during the time complained of in this action, did any act whatever to his dam or waterworks, except to use them as constructed in 1860. The action does not claim damages for the original building of the dam, which was the only direct act of the intestate; and whatever damages may have resulted to the plaintiffs from the use of this dam during the six years prior to September 1, 1872, were mere incidental or collateral results only, and therefore not recoverable against the administrator.

2. The instruction requested by the defendant, that if the backwater on the plaintiffs' wheels was caused in part by the wrongful acts of the defendant's intestate and in part by the lowering of the plaintiffs' wheels and the narrowness of their archway, they had contributed to the injury, and could not recover, should have been given; and the exception to the refusal of the court to give this instruction, and to that part of the charge which laid down a different doctrine, must be sustained. The use by the plaintiffs of an archway so narrow as to set back water on their own wheels, and the lowering of their wheels, were contributory acts of negligence by the plaintiffs, which caused, in part, the injury and loss of power. Shearman & Redfield on Negligence, (3d ed.) §§ 1, 2, 25, 33, 34, 42, and cases cited.

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A jury cannot justly measure or estimate the contribution to the loss of power, and the damage resulting therefrom, which in the nature of the case is indivisible and unascertainable by reason of the mingling of the water, set back to its level from the defendant's dam, and that retarded by the too narrow archway, with that in the depressed wheel-pits of the plaintiffs' mills. Nor can a jury reasonably compare the present with the power and capacity enjoyed by the former mills of the plaintiffs, which, with their dams, wheel-pits and wheels, for twenty-five years prior to the plaintiffs' action, had been removed, without inquiring into an infinite variety of matters, involving legal, scientific mathematical and problematical considerations of varied rights and interests. Because of the futility of such attempts, the common rule in cases of contributory negligence has been sustained and should prevail.

3. The defendant's exception to that part of the charge relating to the right of the plaintiffs to have the water discharged from their premises into the river below, must be sustained. The statement that "the lower proprietor of a mill may maintain a dam, or raise it, so as to use all the unappropriated water-power of the stream;" and that "after each party has made an appropriation of the water-power he is entitled to, neither can make any changes which shall injuriously affect the right of the other;" are incorrect statements of the law. A change which injuriously affected the mill of the other would not injuriously affect his right. That could only be injuriously affected by twenty years' adverse user of the change; and the instruction fails to give the jury a rule to guide them, as to the legal effect of a lowering of the upper wheels and race, which would, of course, not injuriously affect either the right or the mill of the owner below, and from which, therefore, the jury might find that the plaintiffs, by so lowering, had made a lawful appropriation. So, too, that portion of the charge which discusses the right of the plaintiffs to have the water discharge from their premises into the river below, as modified by the right of the defendant's intestate to dam it back or obstruct it, clearly limits the right of the defendant's intestate to such as he may have obtained by adverse use for twenty years, being entirely silent as to any right which he might gain by a lawful appropriation of unoccu-

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pied power, without adverse use for twenty years. The portion of the charge excepted to was, therefore, erroneous in stating incorrectly an abstract proposition of law, and in stating adverse possession for twenty years to be the only mode in which the defendant's intestate could gain a right to interfere with the passage of the water from his premises into the river below, when it should have been stated in this connection that the appropriation by the intestate of unoccupied fall, without damage to the plaintiffs' mills, would also give that right, and this legal principle should have been applied to the evidence as fully as the other.

4. The instruction requested by the defendant before the jury retired should have been given. It was correct in point of law, and there was evidence to which it was applicable and appropriate. The evidence as to the erection of the old fulling-mill dam was specially commented upon by the judge in connection with the law as to gaining of rights by adverse possession, in such a manner that the jury would reasonably infer from it, in the absence of such further instructions as were asked by the defendant, that, unless the right to maintain the fulling-mill dam had been gained by twenty years' adverse use, it did not exist. The attention of the jury was not sufficiently called to the point, that if the erection of the old fulling-mill dam did not in any way injure the mill above as then existing, its erection was a lawful appropriation of unoccupied power, and gave the defendant's intestate the right to maintain a dam at that height, even if such dam had been claimed to be a nuisance and interfered with by the plaintiffs, so that on the ground of adverse possession alone, the defendant would not have gained the right to maintain it. The court having singled out this portion of the evidence for special comment and remark in one aspect of the case, should also have further instructed the jury as to the effect of other rules of law upon the same portion of the evidence, when so requested.

5. The verdict should be set aside for irregularity. In the case at bar the jury had made up and signed their verdict and had delivered it to the clerk, who had made it known to the judge; the judge then caused the clerk to amend this written verdict, and to read the same to the jury. The result of all

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this was to give the jury the impression that they must render some verdict for the plaintiffs. This course was not only irregular, but to receive a second verdict afterwards was highly prejudicial to the defendant. *Clark* v. *Lamb*, 6 Pick. 512. *Jones* v. *Kennedy*, 11 Pick. 125. *Coffin* v. *Jones*, 11 Pick. 45. *Walker* v. *Dewing*, 8 Pick. 520. *Commonwealth* v. *Judd*, 2 Mass. 329, 334. *Chaffee* v. *Pease*, 10 Allen, 537. *Warner* v. *New York Central Railroad*, 52 N. Y. 437. The regular course would have been to have received and recorded the whole paper, handed in by the jury as their verdict, and afterward, on motion of either party, to have struck out from it any part not warranted by the circumstances of the case. This course would have left the verdict in favor of the plaintiffs for only $1, and all the steps subsequent to the reporting of the original verdict were irregular.

H. L. Dawes & M. Wilcox, for the plaintiffs.

COLT, J. The defendant's intestate erected the dam complained of, and, during the time covered by the declaration, maintained the same. The plaintiffs claim damage for injury to their mills caused by the backwater of this dam. It is objected that the cause of action does not survive against the administrator. But the statute exception to the general rule by which actions of tort are held not to survive embraces in its terms actions for damage done to real or personal estate by the wrongful act of a party. Gen. Sts. *c.* 127, § 1. Upon the allegations here made, the real estate and mills of the plaintiffs are diminished in value and their use impaired, as the direct and natural consequence of the wrongful act of the defendant's intestate in maintaining his dam at such a height as to obstruct the flow of water. It is for injury to this specific property that damages are sought to be recovered, and the case is within the exception of the statute. *Cutting* v. *Tower*, 14 Gray, 183. *Norton* v. *Sewall*, 106 Mass. 143. The owner of real estate is liable as well for maintaining as for creating a nuisance thereon.

There was evidence at the trial, tending to show that the backwater complained of was in part caused by the lowering of the plaintiffs' wheel-pit, and in part by the narrowness of the archway through which the water from their wheels was discharged. This evidence did not call for or justify the instruction requested

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by the defendant upon this point. The doctrine of contributory negligence, as applied in actions to recover for an act of mere negligence on the part of the defendant, has no application to the facts here presented. The jury were told that if they found that the backwater was caused in part by the dam and in part by the causes above referred to, then the defendant would be liable for such part of the damage as was caused by the dam only; such part as they "were satisfied arose from the wrongful acts of the defendant's intestate, and not from any other cause." Towards the injury thus defined and limited, the plaintiffs' acts, in lowering their wheel-pit and using an insufficient discharge, in no sense contributed. The fact that the plaintiffs do not make the most skilful and efficient use of their mill privilege does not give the right to diminish their power by additional backwater. *Clarke* v. *French*, 122 Mass. 419. The difficulty in estimating the loss of power, thus chargeable to the act of the defendant's intestate, is no greater than must arise in many like cases which are submitted to the jury without question.

We see no valid objection to that portion of the charge of the judge, which related to the right of the plaintiffs to have the water discharged from their premises into the river below, which is now fairly open to the defendant. It was contended at the trial, by the defendant himself, that the dam of his intestate was erected on one of the natural channels of the Hoosac River, which divided at a point above the plaintiffs' mill, and formed an island, on which the mill of the defendant's intestate was situated; that the plaintiffs' mills discharged the water into this natural stream on their own land; and that the rights of both parties were to be construed and determined accordingly. The defendant cannot now complain that the case was tried upon his own theory. There was no occasion for an application of the rule that, when a right to a raceway over the land of another is obtained solely by deed which fails to define the extent of the grant, then the appropriation which is first made under the deed must govern. If the defendant desired special instructions in this direction, the attention of the judge should have been called to it. It is manifest that the rule, as applied to this case, would have required qualification, in view of the prescriptive rights claimed by both parties.

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The rights of riparian proprietors to the use of running water appropriated for mill purposes were fully stated by the judge, and stated with sufficient accuracy. The jury were told that the lower proprietor may maintain a dam so as to use all the unappropriated water-power, and may cause the water of his pond to set back into the raceway of the mill above, provided it does not obstruct the upper mill-owner's wheel, and that, "after each party has made an appropriation of the water-power he is entitled to, neither can make any changes which shall injuriously affect the rights of the other."

The jury could not have understood from this, that the mere act of lowering the upper mill and raceway, after the defendant's rights were acquired, would constitute an appropriation of additional power in favor of the plaintiffs. The rights which either party might acquire by prescription, in derogation of the rights of the other, were discussed and correctly stated in another part of the judge's charge. And the statement that neither party "could make changes which should affect the rights of the other" had reference to rights acquired by occupancy, and not to those which had been otherwise acquired. The jury must have understood and correctly applied the evidence to the two modes in which the rights of the parties could have been legally acquired.

The instruction requested after the charge and before the jury retired was properly refused. It does not follow that the defendant would not be liable, if the jury should find that a previous dam, with its permanent boarding, did not set back water to the damage of the plaintiffs' mills, and that the present dam is of the same height. The plaintiffs may have acquired prescriptive rights as against the old dam and its permanent boarding, so that the height of the old dam would not now measure the plaintiffs' rights. And, besides, the whole matter was fully covered by the instructions which the judge had already given.

There was no irregularity in the proceedings had in court with reference to the verdict. The only verdict on which the jury agreed was accepted and recorded by the court. The paper which, on first coming into court, the foreman handed to the clerk, when asked if the jury had agreed, contained matter entirely foreign to the issue, which, under the direction of the

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court, was properly erased. But the jury, when asked by the clerk, did not assent to the amended paper as their verdict, and it could not, therefore, be recorded in any form as such. It only remained for the judge to send the jury out for further consultation, and to accept their verdict afterwards rendered, which was correctly responsive to the issue tried, and was duly affirmed in court.

A jury may be sent out again by the court when their verdict does not pass upon the whole matter submitted to them, even if they separated after agreeing upon and sealing up their first verdict, before they came into court. *Pritchard* v. *Hennessey*, 1 Gray, 294. *Commonwealth* v. *Carrington*, 116 Mass. 37, 39. And, before a verdict is recorded, the jury may be required to reconsider it, if it appears to be a mistake, and may be sent out for that purpose. *Root* v. *Sherwood*, 6 Johns. 68. *Blackley* v. *Sheldon*, 7 Johns. 32. *Goodwin* v. *Appleton*, 22 Maine, 453. *Warner* v. *New York Central Railroad*, 52 N. Y. 437.

We cannot see that the proceedings of the court had any tendency to give the jury the impression that they were bound to give a verdict for substantial damages against the defendant, or to prejudice him in that direction. The more natural inference from the whole proceeding would be, that the judge was satisfied with a verdict for nominal damages only. It is enough that on more careful consideration they were able to agree on the verdict which was returned and accepted.

Exceptions overruled.

LEVI L. BROWN PAPER COMPANY *vs.* RANSOM B. DEAN.

Berkshire. Sept. 11. — Oct. 18, 1877. ENDICOTT & LORD, JJ., absent.

An agent, who merely carries on a mill for the owner's benefit, is not liable for its dam, a permanent structure, being maintained at too great a height, whereby the water is set back to the injury of another mill-owner.

TORT for the obstruction, from July 3, 1873, to March 3, 1875, of the machinery of the plaintiff's mills in Adams, by water set back by a dam built by Horatio N. Dean, in 1860;

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lower down the stream. Writ dated March 3, 1875. The case was tried in the Superior Court, before *Dewey*, J., with the preceding case, who reported it for the consideration of this court in substance as follows:

The plaintiff corporation was duly organized on June 11, 1873, and the mill property and rights of the firm of Levi L. Brown and others were duly conveyed to the plaintiff. Horatio N. Dean died intestate on August 15, 1872; and after his decease the defendant, who was his son and copartner, continued to carry on the mill business in the same manner it had been previously carried on, until January 6, 1873, when the heirs of Horatio N. Dean conveyed the mill property to the widow and daughters of Horatio N., and after that date the business of the mills was carried on by the defendant on their account, and acting as their agent, he having a power of attorney from them, dated January 6, 1873, the material parts of which are printed in the margin.*

The defendant contended that on these facts he was not personally liable for any damages arising from maintaining the dam as alleged, and took the same exceptions as in the preceding case, excepting that relating to the survival of the action. The jury returned a verdict for the plaintiff. If the exceptions in the preceding case were sustained upon any other ground, except that no action for the alleged cause could be maintained against

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* "Know all men by these presents: That Mary Dean, Ann Maria Dean and Celestia D. Arnold, all of the town of Owego, Tioga County, N. Y., comprising the firm of H. N. Dean & Son, have made, constituted and appointed, by these presents do make, constitute and appoint, Ransom B. Dean, of South Adams, Massachusetts, our true and lawful attorney, for us and in our stead, to transact all the business connected with the tannery now owned by us. That is to say, the entire care of the business and management of the same, in the purchase of stock, hiring of labor, payment of debts, collecting of outstanding claims; and we fully and severally empower the said Ransom B. Dean to sign the said firm name of H. N. Dean & Son, for all purposes of carrying on said business of tanning, and we hereby fully authorize him to sign the said firm name of H. N. Dean & Son, and do hereby consider ourselves as fully bound and obligated by said signature as fully as we could or would do had we signed it ourselves, in all matters of business pertaining to the purchase and tanning of hides, and to incur any obligation he may deem necessary for the best interest of the said firm and business."

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an administrator, then the verdict in this case was to be set aside, and the case stand for a new trial. If those exceptions were not sustained for any other cause, judgment was to be entered on the verdict in this case, unless the court should be of opinion that, upon the facts herein stated, this action could not be maintained against the defendant, in which case the verdict was to be set aside, and judgment entered for the defendant.

H. L. Dawes, (*M. Wilcox* with him,) for the plaintiff, cited *Bell* v. *Josselyn*, 3 Gray, 309; *Hewett* v. *Swift*, 3 Allen, 420, 425; *Wamesit Power Co.* v. *Allen*, 120 Mass. 352; *Brown* v. *Lent*, 20 Vt. 529; Washburn on Easements, 571.

T. P. Pingree & J. M. Barker, (*F. O. Sayles* with them,) for the defendant.

COLT, J. The injury to the plaintiff's mills was caused by the backwater of a dam on adjoining premises below. For such an injury, an action lies either against the one who erected the dam, or against subsequent owners or occupants who, after notice, continue to maintain the obstruction. *Staple* v. *Spring*, 10 Mass. 72. *McDonough* v. *Gilman*, 3 Allen, 264, 267. *Nichols* v. *Boston*, 98 Mass. 39, 43.

In the case at bar, the dam complained of was erected by Horatio N. Dean in his lifetime, while owner of the property, to supply water for the use of his tannery. The defendant had nothing to do with its construction. Before the time covered by the declaration in this case, Horatio N. died, and the defendant, having no title to the premises, became the agent of the present owners, and carried on the business at the tannery for their benefit under a power of attorney from them. During the time complained of, there was no change in the height or structure of the dam in question. It was a permanent structure, and the defendant had neither ownership, possession, nor such control as would authorize him to change or remove any such structure erected upon the premises by the owner. The defendant, by the power of attorney, was only employed to carry on the business of purchasing and tanning hides. There is no claim that the premises of which the defendant had charge, and which were not in themselves a nuisance by causing backwater, had become a nuisance by the manner in which the defendant had used them. The nuisance here was created by the dam itself.

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The injury complained of is therefore not shown, by the facts reported, to have been caused by any act of the defendant, authorized or unauthorized, connected with either the erection or maintenance of the alleged obstruction. *Carleton* v. *Redington*, 1 Foster, 291. *Noyes* v. *Stillman*, 24 Conn. 15. *Pillsbury* v. *Moore*, 44 Maine, 154.

In *Bell* v. *Josselyn*, 3 Gray, 309, cited by the plaintiff, there was a positive act of negligence on the part of the agent who had charge of the building, from which the plaintiff suffered, and not from a nuisance created or maintained by the owners.

In *Wamesit Power Co.* v. *Allen*, 120 Mass. 352, all the defendants actively participated in the wrong charged.

Judgment for the defendant.

MARY CUMMINGS *vs.* PETER CUMMINGS, administrator.

Berkshire. Sept. 12. — Oct. 18, 1877. ENDICOTT & LORD, JJ., absent.

Where the same person is guardian of an insane person and, after his death, the administrator of his estate, the widow and children of the deceased may contest the guardian's account in the Probate Court, and, if dissatisfied with its decree, appeal therefrom; but if no such appeal is taken from a decree of the Probate Court allowing his account and determining that certain notes were the guardian's private property, the matter is *res adjudicata* as between them and him, and cannot afterwards be reopened between the same persons upon their objections to his account as administrator, although only part of the notes had been collected by the guardian at the time of the settlement of his final account as such.

APPEAL by Mary Cummings from a decree of the Probate Court, allowing the account of Peter Cummings as administrator of the estate of Edward Cummings. Hearing before *Colt*, J., who reported for the consideration of the full court the following case:

On July 16, 1872, Edward Cummings was adjudged by the Probate Court an insane person, on the petition of Peter Cummings, who was duly appointed his guardian. On December 4, 1872, Edward died while under said guardianship, and on January 7, 1873, Peter was duly appointed administrator of his estate. On July 15, 1873, Peter filed in the Probate Court his

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first and final account as guardian, and after due notice to all concerned, Mary Cummings, the widow of Edward, and her two children, who were both of full age, appeared personally and by counsel in the Probate Court, and objected to the account, principally because Peter had not charged himself with, nor returned, in the inventory of the property belonging to the estate, three promissory notes, payable to Edward or order, each dated July 20, 1871, one for $400, payable in five years from date, and the other two for $300 each, payable in six and seven years respectively from date.

Peter contended that these notes were not the property of Edward, but were his own property, and that he should not be charged therewith by the Probate Court in the settlement of the account. Peter claimed title to the notes on the ground that Edward, in August, 1871, in consideration of kinship and kindness, gave, indorsed and delivered the notes to him to be his absolute property. Mary Cummings and her two children denied the gift, and, among other things, contended that Edward at the time of the alleged gift, and ever after, was insane, and mentally incompetent to transact business or to dispose of property.

Upon these issues a hearing was had on January 6, 1874, by the Probate Court, and after consideration of the evidence, and the arguments of counsel, the court sustained the alleged gift, declined to charge Peter with the notes or with the proceeds of them, so far as he had collected anything thereupon, allowed his account as the same was originally presented, and entered a decree accordingly. No appeal was taken from this decree. Peter had collected, prior to the filing of his account as guardian, on said notes, as follows: $300 in May, 1872, applied on the $400 note, and $100, being balance of that note, in September, 1872, and interest to May 23, 1872, on all the notes.

On January 7, 1873, Peter was duly appointed administrator of the estate of Edward, and, as such administrator, filed his inventory of the estate of Edward on February 4, 1873; on March 7, 1876, he filed his administrator's account, and on May 2, 1876, all parties interested appearing in court, and a full hearing having been had, and all the arguments of the parties and their counsel having been fully heard, the same was allowed, and a decree entered accordingly

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At the hearing in the Probate Court on the administrator's account, Mary and her children objected thereto, because the administrator had not in his inventory nor in his account as administrator charged himself with the said notes nor with the moneys collected thereon, and contended that he should be charged therewith; but the court declined so to charge him. Mary Cummings in due time gave notice of an appeal, and filed reasons therefor substantially as above.

Peter, at the hearing in this court, contended that the matters set out in the reasons of appeal were *res adjudicata*, having been heard and passed on by the Probate Court in the settlement of his account as guardian, from which no appeal was taken, and that the same were not open to be again heard and tried in the settlement of the administrator's account. The judge, however, in order to expedite the settlement of the controversy, heard the parties upon the question as to whether Edward was or was not insane at the time of the alleged gift of the notes, and found that he was in fact at that time insane and incompetent to dispose of the notes.

If the court should be of opinion that the matter of the validity of the gift of the notes was not open to be heard and tried in this case, the same having been heard, tried and adjudicated in the hearing of the guardian's account as hereinbefore stated, then the decree of the Probate Court allowing the account was to be affirmed; otherwise, such decree was to be entered, charging the administrator with a part or the whole of the avails of the notes, as law and justice might require.

T. P. Pingree, (*J. M. Barker* with him,) for the appellant.

M. Wilcox, (*W. T. Filley* with him,) for the appellee.

GRAY, C. J. At the settlement of a guardian's account in the Probate Court after the death of his ward, it would ordinarily be the duty of the administrator of the estate of the ward to maintain the rights of the next of kin. But in the present case, the same person being administrator and guardian, the widow and children of the ward were the only persons who contested the account of the guardian. They clearly had such an interest in the estate of the ward as to be entitled to contest the guardian's account in the Probate Court, and, if dissatisfied with its decree in the matter, to appeal therefrom. Gen. Sts. *c.* 117, § 8.

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Penniman v. *French*, 2 Mass. 140. *Boynton* v. *Dyer*, 18 Pick. 1. *Farrar* v. *Parker*, 3 Allen, 556, 558.

The decree of the Probate Court in that controversy between them and the guardian, by which it was determined that the notes in question were his private property, not having been appealed from, was a conclusive adjudication of that fact as between them and him, and could not afterwards be reopened between the same persons upon their objections to his account as administrator, either in the Probate Court, or in this court on appeal from the decree of that court upon the administrator's account.

Although only part of the notes had been collected by the guardian at the time of the settlement of his final account as such, the question whether the notes were his own property was necessarily involved, and was then tried and determined, and the fact so determined was *res adjudicata* in a subsequent litigation between the same persons as to sums afterwards collected by him upon the same notes. *Merriam* v. *Whittemore*, 5 Gray, 316. *Black River Savings Bank* v. *Edwards*, 10 Gray, 387. *Burlen* v. *Shannon*, 99 Mass. 200.

Decree of Probate Court affirmed.

FRANCIS W. ANDERSON & another *vs.* HENRY O. EDWARDS.

Hampshire. Sept. 18. — Oct. 1. 1877. ENDICOTT & LORD, JJ., absent.

Charges of fraud under the Gen. Sts. c. 124, §§ 31–34, against a person applying to take the oath for the relief of poor debtors, are in the nature of civil proceedings, and need not be proved beyond a reasonable doubt; and the debtor and his wife may, under the St. of 1870, c. 393, be called as witnesses by the creditor.

Books of account of a bank, supported by the oaths of its treasurer and the clerk who made the entries therein, identifying the books, although they had no personal recollection of the facts, are admissible in evidence, to prove an account therein.

At the trial of charges of fraud under the Gen. Sts. c. 124, §§ 31–34, the alleged fraud being that the debtor had bought land and had caused it to be conveyed to his wife in fraud of his creditors, if it appears that a part of the consideration was

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procured by means of a mortgage, to a third person by the debtor and his wife, given to secure the debtor's sole note which it was contended that he afterwards paid, the mortgage is admissible in evidence.

APPEAL from a judgment of not guilty rendered by a trial justice, upon charges of fraud filed by judgment creditors against a debtor at his examination upon his application to take the oath for the relief of poor debtors.

One of the charges of fraud was as follows: "That, since the debt was contracted on which F. W. Anderson and another obtained their judgment and execution, the said Edwards has fraudulently conveyed, concealed and otherwise disposed of his estate or some part thereof with a design to secure the same to his own use and to defraud his creditors."

Under this charge, the creditors filed the following specifications: "1. That said Edwards on or about April 1, 1872, purchased of one Graves a house and land situate on Union Street, in Northampton, in the name of his wife, for the sum of $3200; and the whole or greater part of the price paid for said house and land was money furnished by said Edwards and kept and deposited in the name of his wife, and given by him to his wife until the same was paid to the vendor of said house and land. 2d. That between said April 1872 and April 1875, but at what precise time these creditors cannot more particularly specify, the said Edwards placed and deposited in the custody and name of his wife, but for his own use, the sum of $1600, with which to redeem a mortgage outstanding on said house and lands, given in his wife's name; and said money was so paid to said Edwards's use."

Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The creditors' judgments were recovered in actions upon two promissory notes of the debtor dated February 14, 1874, and May 16, 1874, made payable to C. F. Simonds or order, indorsed to the creditors, and given in renewals of other notes, the earliest of which were made in 1865 or 1866. The house and land referred to in the charges of fraud were purchased of one Graves, for the sum of $3200, and conveyed by him, on March 1, 1872, to Elizabeth H. Edwards, the debtor's wife, who on March 4, 1872, the debtor joining in the deed, mortgaged the land and

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house to one Curtis to secure the payment of the debtor's sole note of $1600, payable in five years from March 4, 1872. On the purchase of the land and house, Graves was paid $3200 in cash, $1600 of which sum was procured of Curtis by means of the mortgage. The mortgage was discharged after the payment of the defendant's note of $1600, on September 10, 1874; and from the time of the purchase the debtor occupied the house with his family as a homestead.

The questions of fact were, whether the defendant purchased the land and house and paid the price of them, by his moneys, and procured the conveyance of them to his wife, in fraud of creditors, or whether the house and land were purchased by the defendant's wife, and paid for by moneys which were her sole and separate property, earned and received in gifts, and accumulated by her before and during her married life, with the defendant, of nineteen years.

The creditors were allowed, against the debtor's objection, to call the debtor and his wife, Elizabeth H. Edwards, and to examine them in relation to the matters in controversy.

The creditors were allowed to put in evidence, against the objection of the debtor, the ledger, and books of original entries of the Hampshire Savings Bank, showing therein entries of the dates of deposits, and the sums deposited to the credit of Elizabeth H. Edwards, in the bank, and the dates and amounts of her drawing and receiving money therefrom between August 1872, and May 16, 1873, and also the evidence of the treasurer and clerk of the bank, identifying such ledger and books as the books of the bank, neither the treasurer nor clerk making the entries being able, by means of the books, to recall the facts of such dates or entries, as matters of personal memory. The entries tended to contradict the evidence of the defendant and his wife, on their examination by the plaintiffs in relation to transactions in deposits and drafts of money on account of Elizabeth H. Edwards with the bank.

The mortgage of Elizabeth H. Edwards to Curtis, was permitted by the judge to be put in evidence against the objection of the defendant.

The debtor requested the judge to rule, that the burden of proof was on the creditors to prove the alleged fraud of the

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debtor beyond a reasonable doubt, but the judge refused so to rule, and instructed the jury that they might find the defendant guilty upon any of the alleged acts of fraud on trial, which in their judgment were supported by a clear preponderance of evidence.

The judge gave instructions to the jury, upon the right of a husband to make gifts of property to his wife, or investments of property in her name or for her benefit, and the circumstances affecting his indebtedness and creditors, in which such gifts or investments were lawful and justifiable, and to these instructions no exception was taken.

The jury returned a verdict of guilty; and the debtor alleged exceptions.

W. G. Bassett, for the debtor.

C. Delano, (*J. C. Hammond* with him,) for the creditors.

MORTON, J. Proceedings under the Gen. Sts. *c.* 124, for the relief of poor debtors arrested on mesne process or execution, are essentially in their nature civil proceedings. They are instituted by the debtor to obtain his discharge from imprisonment for debt; they are cognizable only by courts of civil jurisdiction; *Parker* v. *Page*, 4 Gray, 533; and, like other civil actions, they are at all stages of the proceedings under the control of the parties thereto. It is true that, as one of the incidents of the proceedings, the creditor may file charges of fraud, which, if proved, may at the discretion of the magistrate or court subject the debtor to imprisonment, but, as is said in *Parker* v. *Page*, *ubi supra*, such charges are not "an independent, distinct substantive process against a debtor. They are only incidental to the previous proceeding commenced by him to obtain his release from confinement on civil process. The statute therefore gives to them the characteristics of a civil proceeding." It provides that "the charges shall be considered in the nature of a suit at law," that either party may appeal from the judgment of the magistrate to the Superior Court, "in like manner as from the judgment of a justice of the peace in civil actions;" and that by consent of parties the court may hear and determine the charges without a jury. Gen. Sts. *c.* 124, §§ 31–34.

The liability of the debtor to be imprisoned is not indeed one of the ordinary incidents of a civil action; and it has been held

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that a charge of fraud partakes so far of the nature of an accusation of a crime that it must be fully and plainly, substantially and formally described, under the twelfth article of the Declaration of Rights, though the technical strictness required in indictments and complaints may not be necessary. *Chamberlain* v. *Hoogs*, 1 Gray, 172. *Stockwell* v. *Silloway*, 100 Mass. 287. But in most particulars the proceedings are in the nature of a civil action between the creditor and debtor.

The principal object of them is to determine whether the debtor is entitled to be released from imprisonment for debt at the suit of the creditor. But for the provision authorizing the imprisonment of the debtor if convicted upon charges of fraud, it is entirely clear that the same rules of evidence would apply as in any civil action. We are of opinion that it is not the purpose or effect of this provision to change the rules of evidence and to put upon the creditor the burden of a greater stringency of proof. It follows, therefore, that the Superior Court correctly held that the rule of evidence, applied in strictly criminal cases, that the allegations must be proved beyond reasonable doubt, was not applicable in this case. See *Richardson* v. *Burleigh*, 3 Allen, 479.

For the same reasons the ruling of the court, that it was competent for the creditors to call as witnesses the debtor and his wife, under the St. of 1870, *c.* 393, was correct.

The books of the Hampshire Savings Bank, supported by the oaths of the treasurer and clerk who made the entries therein, were properly admitted in evidence. *Adams* v. *Coulliard*, 102 Mass. 167. *Briggs* v. *Rafferty*, 14 Gray, 525. *McKavlin* v. *Bresslin*, 8 Gray, 177.

The exception to the admission of the deed of mortgage from the debtor's wife to Curtis is without foundation. The fraud alleged was that the debtor had bought a house and lot of Graves and had caused it to be conveyed to his wife for the purpose of defrauding his creditors. A part of the consideration paid Graves was procured by means of the mortgage to Curtis, which was given to secure the debtor's sole note, afterwards, as it was claimed, paid by him. The debtor joined in the mortgage. It was not, therefore, as argued by the debtor, *res inter alios*, but was a part of the transaction alleged to be fraudulent and was clearly admissible in evidence. *Exceptions overruled.*

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HENRY HOLLAND *vs.* EDSON S. MARTIN.

Hampshire. Sept. 17. — Oct. 15, 1877. COLT, ENDICOTT & LORD, JJ., absent.

A creditor of a bankrupt, whose claim is provable but has not been proved in bankruptcy, may, under the U. S. Rev. Sts. § 5106, prosecute to final judgment an action against the bankrupt, if no motion is made for a stay of proceedings, and the assignee does not intervene.

GRAY, C. J. This is an action upon a promissory note. The defendant, in his answer to the merits, pleaded that before the commencement of this action the defendant was duly adjudged a bankrupt, that the debt sued upon was provable and proved in bankruptcy, and would be barred by a certificate of discharge, and that the proceedings in bankruptcy were still pending.

At the trial before the Chief Justice of the Superior Court, without a jury, there was no dispute as to the correctness of the plaintiff's claim; the defendant proved the allegations of his answer, except that it appeared that the claim had not been proved in bankruptcy, and that there was still opportunity for the plaintiff so to prove it, the third meeting of creditors not having been held; and it also appeared that the plaintiff was the defendant's assignee in bankruptcy.

The defendant, as the bill of exceptions states, made no claim that the case should be continued to enable him to obtain a certificate of discharge; but asked for a ruling that his bankruptcy was a bar to the action, and that upon the facts above stated the action could not be maintained. The presiding judge declined so to rule, and ruled that upon the facts the plaintiff was entitled to recover, and gave judgment accordingly; and the defendant alleged exceptions.

At the argument in support of the exceptions, the defendant's counsel referred to the following provisions of the bankrupt act:

By the U. S. Rev. Sts. § 5105, "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged

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and surrendered thereby." By the U. S. St. of June 22, 1874, § 7, this section has been amended by adding, "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge."

By the U. S. Rev. Sts. § 5106, "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

If the defendant had established the allegation of his answer that the plaintiff had proved his debt in bankruptcy, the question would have been presented whether, under § 5105 as amended, an adjudication in bankruptcy was a bar to an action subsequently commenced against the bankrupt by a creditor who had proved in bankruptcy the debt sued on. But the defendant failed to establish that allegation; the only provision of the bankrupt act which restrains a creditor, whose claim is provable but has not been proved in bankruptcy, from prosecuting to final judgment an action against the bankrupt, is that contained in § 5106; and this court has repeatedly decided that under this provision the action is not absolutely barred, but that, if the bankrupt does not move for a stay of proceedings for the purpose of obtaining and pleading his discharge, and the assignee does not intervene in defence of the action, the court may proceed to judgment. *Dunbar* v. *Baker*, 104 Mass. 211. *Cutter* v. *Evans*, 115 Mass. 27. *Ray* v. *Wight*, 119 Mass. 426.

The defendant has referred us to two opinions delivered in the federal courts: the one by Judge Drummond, in the Circuit Court of the United States for the Western District of Wisconsin; and

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the other by Mr. Justice Davis, in the Supreme Court of the United States. *In re Williams*, 6 Bissell, 233, 236. *Wills* v. *Claflin*, 92 U. S. 135, 141. But the observation of Judge Drummond, that the creditor "should not have commenced an action against the bankrupts in the state court after the proceedings in bankruptcy had been instituted," had reference to an action in which the debtor, after having been adjudged a bankrupt, was arrested, in direct contravention of § 5107 of the bankrupt act. And the general remark of Mr. Justice Davis, that "the bankrupt act prevents the institution and prosecution of suits against parties in bankruptcy," was made in deciding that an adjudication in bankruptcy against the maker of a promissory note was evidence in favor of the holder, in an action brought by him against another party to the note, that a suit against the maker would have been unavailing. The opinions thus expressed cannot, as it seems to us, be applied to this case, without disregarding the plain meaning of the bankrupt act, and the opinion and decision of the Supreme Court in *Doe* v. *Childress*, 21 Wall. 642.

As the proceedings in bankruptcy did not constitute an absolute bar to the action, and neither the defendant nor the assignee moved for a suspension or a continuance, judgment was rightly rendered for the plaintiff. *Exceptions overruled.*

H. H. Bond, for the defendant.

C. Delano, (*J. C. Hammond* with him,) for the plaintiff.

SAMUEL BAMFORTH & another *vs.* SARAH M. BAMFORTH & others.

Hampshire. Sept. 25. — Oct. 15, 1877. ENDICOTT & LORD, JJ., absent.

A testator, by his will, gave his parents the use and improvement of all his estate, both real and personal, "and so much of the estate itself as may be necessary for their comfortable support so long as either of them shall live;" and "at the death of my parents" devised to a sister and a friend, "should either of them be living," a certain part of the remainder; and, "after the above bequests have been taken out of the estate," directed that the residue should be equally divided between persons named. *Held*, on a petition for the sale of the real estate, under the St. of 1868, c. 287, that the devise over was a contingent remainder. *Held, also*, that

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the will created no trust estate, either expressly or by implication, and that a decree of the Probate Court dismissing a petition filed under the St. of 1869, *c.* 331, for the sale of the real estate, on the ground that the remainder was vested, was not a bar.

PETITION under the St. of 1868, *c.* 287, for a decree for a sale of land, on the ground that it was incumbered by contingent remainders.

At the hearing, before *Colt*, J., it appeared that Otis C. Bamforth died seised of the land in question, and that his will contained the following clauses:

"I give and bequeath to my parents, Samuel Bamforth and Betty Bamforth, the use and improvement of all my estate, both real and personal, of which I may be possessed at the time of my decease, and so much of the estate itself as may be necessary for their comfortable support so long as either of them shall live.

"At the death of my parents, I give and bequeath to my sister Sarah M. Bamforth, and my friend Nancy Eleanor Spaulding, should either of them be living, one fourth each of my estate then remaining.

"After the above bequests have been taken out of the estate, I order and direct that the remainder be equally divided into five equal parts, and given to the following persons, viz.: Martha Ann Whitehouse, wife of Joseph B. Whitehouse; James Watson Bamforth, Sarah M. Bamforth, William C. Bamforth and Nancy Eleanor Spaulding.

"Should either of the above named persons die before the division last named is made, leaving no children, I order and direct that the amount be equally divided among the survivors."

The petitioners were the father and mother of the testator, and it was admitted that a like petition had, under the St. of 1869, *c.* 331, before this petition was filed, been presented, heard and dismissed in the Probate Court; that one of the questions before that court was, whether the respondents' interest under the will was a contingent or vested remainder; and that that court held it to be a vested remainder.

The justice of this court found upon the evidence that it appeared to be necessary and expedient that a sale and conveyance of the real estate be made as prayed for; and, at the

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request of the respondents, reserved the case for the consideration of the full court.

W. G. Bassett, for the petitioners.

A. J. Fargo, for the respondents.

GRAY, C. J. The legal effect of the testator's dispositions of his real estate is as follows: He first gives his parents an estate for life. He also gives them "so much of the estate itself as may be necessary for their comfortable support so long as either of them shall live," thereby giving them a power to dispose of so much of the fee as may be necessary for that purpose; and, whether their determination upon such question of necessity is or is not conclusive, no trust is created in them or in the executor. *Minot* v. *Prescott*, 14 Mass. 496. *Stevens* v. *Winship*, 1 Pick. 318. *Larned* v. *Bridge*, 17 Pick. 339. *Harris* v. *Knapp*, 21 Pick. 412. *Dodge* v. *Moore*, 100 Mass. 335. *Whitcomb* v. *Taylor*, 122 Mass. 243. The devise over, "at the death of my parents," to a sister and a friend, is made contingent by the words "should either of them be living;" and the residuary devise to other persons, "after the above bequests have been taken out of the estate," is necessarily likewise contingent. *Holm* v. *Low*, 4 Met. 190, 201. *Thomson* v. *Ludington*, 104 Mass. 193.

As the will created no trust estate, expressly or by implication, the Probate Court had no jurisdiction to order a sale under the St. of 1869, *c.* 331, whether the remainder was vested or contingent, and its opinion upon that question was extrajudicial and of no binding effect.

The estate being, in our opinion, incumbered by a contingent remainder, and the justice of this court, before whom the hearing was had, having found it to be necessary and expedient that a sale and conveyance should be made, it is so ordered. St. 1868, *c.* 287. *Symmes* v. *Moulton*, 120 Mass. 343.

Petition granted.

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CHARLES L. WARREN *vs.* PATRICK SULLIVAN & trustee.

Hampshire. Sept. 18. — Oct. 18, 1877. ENDICOTT & LORD, JJ., absent.

Where A. executed to B. an assignment of wages due and to become due for a certain term from C., as security for goods already furnished and to be furnished by B. from time to time during the term, but to no specified amount, the excess due from C. at any time, over and above the amount then due from A. to B., may, under the St. of 1865, c. 43, § 1, be held upon trustee process in favor of a creditor of A.

TRUSTEE PROCESS. Writ dated April 26, 1876, and served on April 28, 1876. The principal defendant was defaulted. The Northampton Cutlery Company was summoned as trustee. Albert S. Bacon appeared as claimant of the funds in the hands of the trustee, by virtue of the following assignment, under seal, dated April 20, 1876, signed by the defendant and duly recorded:

"Know all men by these presents that I, Patrick Sullivan of Northampton, in the county of Hampshire, in consideration of one dollar and other valuable considerations to me paid by Albert S. Bacon of Northampton, the receipt whereof I do hereby acknowledge, do hereby assign and transfer to said Albert S. Bacon all claims and demands which I now have, and all which at any time between the date hereof and the first day of April next, I may and shall have against the Northampton Cutlery Company, for all sums of money due and for all sums of money and demand which, at any time between the date hereof and the said first day of April next, may and shall become due to me for services as laborer. To have and to hold the same to the said Albert S. Bacon, his executors, administrators and assigns forever."

At the trial in the Superior Court, before *Bacon*, J., without a jury, it was agreed that on the day of service upon the trustee, the principal defendant owed the claimant but $38.70, and it was conceded that his earnings in the hands of the trustee on that day exceeded that sum. The judge found as a fact that the assignment was given as security to the claimant for goods already furnished to the defendant by the claimant, and as security for what goods the claimant should let him have from time

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to time from his store, during the term of the assignment, and that the assignment was valid and was made without any fraudulent intent, for and in consideration that the claimant should not only apply said earnings to the payment of any indebtedness existing at the date of the assignment, but should also, from time to time, during the term named in the assignment, furnish the defendant with goods from his store, for the use of the defendant and his family.

The plaintiff requested the judge to rule, that, under the St. of 1865, *c.* 43, § 1,* the excess in the hands of the trustee, above $38.70, the amount agreed to be due Bacon at time of service, should be subject to be held by the trustee process in the same manner and with the same effect as if no assignment had existed.

The judge refused so to rule, but ruled that, the assignment being found valid and not fraudulent, the future earnings of the defendant passed thereby to the claimant, and were not liable to be attached by trustee process; and that the provisions of the St. of 1865 did not apply so as to make any excess of such future earnings, over and above the amount actually due from the defendant to the claimant at the date of the service of the trustee process, liable to be attached by trustee process, because it was held to secure not only an existing debt, but also to secure the claimant for goods which he should from time to time let the defendant have from his store during the term of the assignment; and found for the claimant. The plaintiff alleged exceptions.

J. B. Bottum, for the plaintiff.

F. A. Beals, for the claimant.

SOULE, J. The learned judge, who tried this case without a jury, found as a fact that the assignment, under which the claimant insists that he is entitled to the fund, was made without fraudulent purpose, as security to the claimant for goods already furnished, and as security for such goods as should thereafter be

* This act provides that if the assignment "is held only as security for a debt," the court shall determine "the amount due upon such debt" at the time of service upon the trustee, and the excess in the hands of the trustee, above the amount so found due, shall be subject to be held by the trustee process, as if no assignment existed.

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furnished to the principal defendant by the claimant, and in consideration that the claimant should furnish the defendant with goods from time to time during the term named in the assignment. It does not appear that there was any agreement by the defendant to buy goods to any specified amount; nor by the claimant to sell goods to any specified amount. Either party was free to discontinue the dealings at any time. The assignment being made and held only as security for payment for such goods as had been or should be sold to the defendant, the rights of the claimant to retain the wages assigned, after the end of the term named in the assignment, would cease when he had been fully paid for what he had sold. The defendant would be entitled to any balance of the wages remaining after such payment to the assignee. This is the meaning of the statement that the assignment was given as security for goods sold and to be sold. It appears, therefore, that the assignment was held "only as security for a debt," within the meaning of the St. of 1865, *c.* 43, § 1, and that the plaintiff is entitled to hold the balance in the hands of the trustee above the amount due the claimant at the time of service of the writ.

The rule of law having been established, that the real consideration of assignments of future wages may be inquired into, and the facts having been found as above stated, the case is brought into very close resemblance to those cases in which the assignment set forth in terms that the balance of wages remaining after payment and satisfaction of all the debt and advances should be paid to the assignor. In those cases, before the St. of 1865, it was held that the trustee must be charged for any balance in his hands at the service of the writ, above the amount then due the assignee. *Darling* v. *Andrews*, 9 Allen, 106. The like agreement is implied in the finding that the assignment was held as security.

We are of opinion that the learned judge erred in refusing to rule that the excess in the hands of the trustee, above the amount due the claimant at the time of service, was subject to be held by the trustee process, in the same manner and with the same effect as if no assignment had existed.

Exceptions sustained.

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WILLIAM L. NOYES *vs.* JOHN F. MARSH & another.

Hampden. Sept. 26. — Oct. 2, 1877. ENDICOTT & LORD, JJ., absent.

A. agreed in writing with B. that if B. would buy certain shares in a corporation held by C., the company should employ him at a certain yearly salary; that if the company should fail or refuse to give him employment, A. would purchase the stock of him at a fair price; that if the parties could not agree as to what was a fair price, the same should be determined by arbitrators, whose decision should be binding. *Held*, that, even if the agreement was not void as against public policy, a bill in equity, by B. against A., for specific performance of the agreement, would not lie.

BILL IN EQUITY by William L. Noyes against John F. Marsh and William B. Smith, containing the following allegations:

That on September 7, 1874, the plaintiff and the defendants made an agreement in writing as follows: "If the said Noyes shall purchase sixty-three shares of the capital stock of the Springfield Glazed Paper Company now held by George Fowler, the said Marsh and Smith agree to and with him that the said company shall give him employment at such service as the officers of said company may reasonably require at an annual salary of $1350 per year. They also agree with said Noyes that, in case the said company shall hereafter fail or refuse to give him employment as aforesaid, they will purchase of him the said shares of stock at a fair price. If the parties hereto cannot agree what is a fair price, it is further agreed that the same shall be fixed by arbitration, said Noyes to choose one arbitrator, said Marsh and Smith one, and the two so chosen shall select a third. And all the parties hereto agree that the decision of said arbitrators shall be binding, and said Noyes shall sell to said Marsh and Smith said stock, and they shall purchase the same of him at the price so fixed. But said Smith and Marsh shall not be obliged or holden to purchase said stock if said Noyes shall decline to accept said employment and pursue the same, or fail to hold himself in readiness to perform said service, nor if said Noyes shall fail faithfully and competently to discharge the duties of his employment. And it is further agreed that if any question arises as to the breach of said last proviso and condition, the same shall be settled by the aforesaid board of arbitrators. But if for any cause said Noyes shall cease to be employed by said

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company, and shall prefer to keep said stock without employment, he may do so."

That the plaintiff did, in accordance with the agreement, purchase said sixty-three shares of stock of Fowler, and had ever since held himself in readiness at all times to accept and pursue such employment as the company should require in accordance with the agreement, and continued in the employment of the company until January 4, 1876, when he was discharged from the employ of the company, although he had always faithfully and competently discharged the duties of his employment.

That the plaintiff thereupon offered to sell his stock to the defendants at a fair price and requested the defendants to purchase the same, which they declined and refused to do.

That the plaintiff and the defendants could not agree what was a fair price therefor, and that the plaintiff had demanded the arbitration as provided for in the agreement, and had designated to the defendants his choice of an arbitrator, but the defendants neglected and refused to choose an arbitrator, as agreed, and to submit the matters in dispute to such arbitration as provided in the agreement.

The prayer of the bill was for a specific performance of the agreement; and for general relief. A demurrer for want of equity was sustained by *Colt*, J.; and the plaintiff appealed.

H. B. Stevens, for the plaintiff.

G. M. Stearns & M. P. Knowlton, for the defendants.

GRAY, C. J. It would seem that the contract sought to be enforced was void as against public policy, and that the court should dismiss the bill upon that ground. *Guernsey* v. *Cook*, 120 Mass. 501. *Dunham* v. *Presby*, 120 Mass. 285. But if the contract is valid, and can be sued on in any form, the bill cannot be maintained, because it does not show that the plaintiff has not an adequate remedy by action at law for the defendants' refusal to purchase his shares. *Thorndike* v. *Locke*, 98 Mass. 340. *Jones* v. *Newhall*, 115 Mass. 244. *Somerby* v. *Buntin*, 118 Mass. 279, 287. 1 Story Eq. Jur. (12th ed.) §§ 724 *& seq.* A court of equity will not decree specific performance of an agreement to submit a matter to arbitration. *Street* v. *Rigby*, 6 Ves. 815. *Vickers* v. *Vickers*, L. R. 4 Eq. 529. *Tobey* v. *Bristol*, 3 Story, 800. *Pearl* v. *Harris*, 121 Mass. 390. *Decree affirmed.*

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ISRAEL HARMON & another *vs.* TERRENCE FLANAGAN & another.

Hampden. Sept. 26. — Oct. 2, 1877. ENDICOTT & LORD, JJ., absent. SOULE, J., did not sit.

Where the owner of land leases it to A., subject to a lease of part of the same to B., for a shorter term, A. "to collect rent from B. for so much of the term as has not elapsed," A. is entitled to the rent subsequently accruing under B.'s lease, and may sue for it in his own name.

CONTRACT, by Israel Harmon and Henry Cooley, against Terrence Flanagan and F. W. Nelen, to recover the rent of certain rooms in a block on Main Street in Springfield. Writ dated May 6, 1876.

At the trial in the Superior Court, before *Brigham*, C. J., the plaintiffs introduced in evidence a lease from one Townsley to the defendants, dated May 1, 1871, of the northerly half of the second and third stories of the above block "for the term of five years from the first day of May, A. D. 1871, yielding and paying therefor the rent of one thousand dollars per annum," and also a lease from Townsley to the plaintiffs, dated February 10, 1873, of the northerly half of the same block, containing the following clause: "The premises are leased subject to the lease of Nelen and Flanagan, now on the upper part thereof, and the said Harmon and Cooley are entitled to collect rent from them for so much of the term as has not elapsed at March 1st next. This lease is to continue for the term of ten years, said term and the rent to commence on the first day of March, 1873, and to terminate on the first day of March, 1883."

The defendants asked the judge to rule that, by the terms of the instrument from Townsley to the plaintiffs, no assignment of the original lease to the defendants, was made; and that the plaintiffs were not thereby made capable of maintaining this action in their own names. The judge declined so to rule, but instructed the jury that, it being conceded that the defendants executed the lease, they were liable to pay the rent to the end of the term, and that the assignment and conveyance by Townsley to the plaintiffs would enable them to maintain the action; and directed the jury to return a verdict for the plaintiffs. The defendants alleged exceptions.

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H. B. Stevens, for the defendants.

M. P. Knowlton, for the plaintiffs.

GRAY, C. J. The lease for ten years from the owner of the fee to the plaintiffs expressly conveyed to them an estate in the premises extending beyond the term of the prior lease for five years to the defendants, and the rent subsequently accruing under that lease, and entitled them to sue for such rent in their own names. *Burden* v. *Thayer*, 3 Met. 76. *Kendall* v. *Carland*, 5 Cush. 74. *Hunt* v. *Thompson*, 2 Allen, 341.

Exceptions overruled.

HENRY FULLER, JR. *vs.* MAYOR AND ALDERMEN OF SPRINGFIELD.

Hampden. Sept. 25. — Oct. 19, 1877. ENDICOTT & LORD, JJ., absent. SOULE, J., did not sit.

The St. of 1874, *c.* 275, § 2, providing that "every highway or townway hereafter laid out shall be deemed to be laid out" under the Gen. Sts. *c.* 43, and the amendments thereof, "unless the order laying out the same expressly declares the same to be laid out" under the betterment acts, applies to a case of widening a street by a city, the final order for which was passed after the St. of 1874 took effect.

PETITION for a writ of certiorari, to quash an order of the board of mayor and aldermen of the city of Springfield, passed December 20, 1875, assessing betterments occasioned by the widening of East Court Street, one of the reasons assigned for the invalidity of the assessment being that the order of widening the street was passed after June 27, 1874, when the St. of 1874, *c.* 275, took effect, and that it did not state that the street was widened under the provisions of law authorizing the assessment of betterments.

It appeared, from the record annexed to the answer of the respondents, that the order of widening was introduced on June 22, 1874, and passed on July 13, 1874.

Hearing before *Colt*, J., who reserved the case for the consideration of the full court.

M. P. Knowlton, for the petitioner.

N. A. Leonard, for the respondents.

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GRAY, C. J. The St. of 1874, *c.* 275, is entitled "An act in relation to the laying out of highways and town ways," and contains the following provisions:

"Section 1. Highways and town ways may be laid out, constructed, altered, widened, graded or discontinued under the provisions of chapter forty-three of the General Statutes and any general laws in amendment thereof, notwithstanding the acceptance by any city or town of any act authorizing the assessment upon estates benefited of a portion of the cost of such highways or town ways.

"Section 2. Every highway or town way hereafter laid out shall be deemed to be laid out under the provisions of said chapter forty-three of the General Statutes and any general laws in amendment thereof, unless the order laying out the same expressly declares the same to be laid out under the provisions of law authorizing the assessment of betterments."

The first section of this statute was declaratory of the law as previously existing; and the second section was evidently intended to cure the difficulty which before existed in ascertaining whether the proceedings were under the highway act or under the betterment act — a question most important to the landowner, because it affected the benefits which might be deducted from his damages, as well as the tax which might be imposed upon him. *Allen* v. *Charlestown*, 109 Mass. 243. *Godbold* v. *Chelsea*, 111 Mass. 294. *Ryan* v. *Boston*, 118 Mass. 248. As the statute contains no saving or exception of proceedings pending, it clearly applies to cases in which the final order was passed after the statute took effect. *New London Northern Railroad* v. *Boston & Albany Railroad*, 102 Mass. 386, 390, 391.

The order of the respondents, assessing a betterment upon this petitioner, can only be upheld upon the theory that the order of widening is under the betterment act, as the respondents contend that it is. But the difficulty is that the order does not so state. It is argued by the learned counsel for the respondents that the statute above quoted does not require such a statement in the case of widening an existing highway, but only in the case of laying out a new highway. But although the words "constructed, altered, widened, graded or discontinued," which follow the words "laid out" in the first section of the statute,

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are not repeated in the second section, we are of opinion that the whole act, read in the light of the previous law, and of the object to be accomplished, manifests the intent of the Legislature that the words "laid out" in the second section, like the words "laying out" in the title of the statute, should not be limited to an original laying out, in the strictest sense, but should include every order of the municipal authorities by which private property is taken or injured for the purpose of a public way. *Writ of certiorari to issue.*

J. E. PRENTICE *vs.* SILAS J. BRIMHALL.

Worcester. October 2, 1877. ENDICOTT & LORD, JJ., absent

On a promise made to the vendor by the purchaser of an equity of redemption, to assume and pay, as part of the consideration named in the deed, the mortgage on the land, no action lies by the mortgagee.

CONTRACT. Writ dated September 27, 1875. The declaration alleged that on April 4, 1874, William S. Hillman, in consideration of $3000, to him paid by the defendant, executed to the defendant a deed of certain real estate in Worcester, and the defendant accepted the same; that the deed contained the following clauses: "This conveyance is made subject to a mortgage for $1200, and interest since March 4, 1874, and also a mortgage for $600, which the said grantee assumes and agrees to pay and save said grantor safe and harmless therefrom." "And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee and his heirs and assigns, that I am lawfully seised in fee simple of the granted premises, that they are free from all incumbrances except mortgages for $1800 and interest, which said grantee assumes and agrees to pay as a part of the consideration."

The declaration further alleged that the defendant retained from the purchase price of the real estate the amount of both of the mortgages, to pay the same; that Hillman entrusted the defendant with the amount so retained by him as a trust and fund from which the notes, which the mortgages were given to secure,

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were to be paid by the defendant, whereby, and by the acceptance of said trust and fund for the benefit of the mortgagees named in the mortgages, and by the terms of the deed, the defendant became liable to and promised the holders of the mortgages to pay them and the notes they were given to secure, as they might fall due; that the mortgages upon the real estate were, a mortgage from Amory Carter to Mary Spaulding, dated September 4, 1871, for $1200, and a mortgage from Hillman to Henry L. Prentice, dated March 30, 1874, to secure the payment of a note for $600, signed by Hillman, payable to the order of Henry L. Prentice in one year from date; that the second mortgage and the note secured thereby were assigned by Henry L. Prentice to the plaintiff on April 3, 1874, and that ever since that date the plaintiff has been the holder thereof; that the note secured by the first mortgage to Spaulding became due and payable on demand after the date thereof, and the defendant neglected and refused to pay it to Spaulding from the trust and fund in his hands retained by him as aforesaid, by reason whereof and by virtue of a power of sale in the mortgage, Spaulding foreclosed the same, and sold the premises at public auction for $1425, thereby selling out the second mortgage aforesaid, then held by the plaintiff, by reason of which the defendant deprived and caused the plaintiff to be deprived of said mortgage security for his note; that Hillman had long since been adjudged a bankrupt, without any assets coming to the hands and possession of his assignee; and that the note of Hillman assigned to the plaintiff, and secured by the second mortgage, is due and unpaid by the defendant, though he has often been requested by the plaintiff to pay the same; and that, by reason of the premises, the defendant owed the plaintiff the amount of the note and interest.

The defendant demurred to the declaration. The Superior Court sustained the demurrer, and ordered judgment for the defendant thereon; and the plaintiff appealed to this court.

C. A. Merrill, for the plaintiff. The case at bar differs from *Mellen* v. *Whipple*, 1 Gray, 317, in these respects: In that case the grantee did not assume and agree to pay the mortgage as a part of the consideration; the grantee had no money or property which in equity belonged to the plaintiff, no property being reserved by him, with his grantor's consent, to meet the mort-

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gagee's claim; the agreement to assume and cancel was a mere promise of indemnity, and the plaintiff assumed that the express promise made by the grantee of the equity to pay the mortgage, without retaining any money from the consideration with which to pay it, so far enured to the benefit of the mortgagee as to enable him to bring an action upon that express promise in his own name.

In the case at bar, the defendant expressly agreed to apply the money retained by him as a part of the consideration to the payment of the plaintiff's mortgage. The price being agreed upon, the vendor credited the vendee with the amount of the mortgages assumed, as so much money deducted and retained by the vendee to pay the mortgages, and, by consequence, the vendee paid to the vendor for the property an amount arrived at by deducting and retaining from the purchase price the amount of the mortgage. It is not real estate, but money, that the defendant deducted and retained with which to pay the mortgage. In such a case, the law raises a promise in favor of the beneficiary of the trust or fund so retained. *Dutton* v. *Pool*, 1 Vent. 318. *Martyn* v. *Hind*, Cowp. 437, 443. *Arnold* v. *Lyman*, 17 Mass. 400. *Hall* v. *Marston*, 17 Mass. 575. *Felch* v. *Taylor*, 13 Pick. 133. *Carnegie* v. *Morrison*, 2 Met. 381, 405. *Fitch* v. *Chandler*, 4 Cush. 254. *Brewer* v. *Dyer*, 7 Cush. 337, 340. *Braman* v. *Dowse*, 12 Cush. 227. *Frost* v. *Gage*, 1 Allen, 262. *Adams* v. *Adams*, 14 Allen, 65. *Putnam* v. *Field*, 103 Mass. 556. The transaction is equivalent to the payment by the grantee to the grantor of the entire consideration, and the payment back by the grantor to the grantee of a sum of money sufficient to pay the mortgage note of the grantor held by a third person.

G. H. Ball, for the defendant, was not called upon.

GRAY, C. J. The defendant, by accepting the deed, made a contract with his grantor to pay the amount of the mortgages upon the land granted; but the grantor transferred no money or fund to the defendant; and the defendant made no contract with the mortgagees or their assigns, upon which an action at law will lie. *Mellen* v. *Whipple*, 1 Gray, 317. *Exchange Bank* v. *Rice*, 107 Mass. 37. *Pettee* v. *Peppard*, 120 Mass. 522.

In *Felch* v. *Taylor*, 13 Pick. 133, and *Adams* v. *Adams*, 14 Allen, 65, in which the acceptance of a devise of land, charged

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with the payment of an annuity or legacy, was held to create an implied promise upon which the annuitant or legatee could maintain an action against the devisee, the defendant had received property out of which to pay the plaintiff's claim, and had made no contract with any other person, and, at the time of the first of those decisions, there being in this Commonwealth no jurisdiction in equity of such cases, a breach of the defendant's undertaking could not have been effectually redressed in any other form than that which was sustained by the court.

Judgment affirmed.

S. L. SHAFFER *vs.* SAMUEL SAWYER.

Worcester. October 2. — 3, 1877. ENDICOTT & LORD, JJ., absent.

A. sold a sewing machine to B. under an agreement in writing, by the terms of which the title was to vest in him on payment of the price. In an action of replevin of the machine by A., there was evidence that A.'s agent delivered the machine to B. and agreed to take in part payment labor performed by B. for him. B. offered evidence that, prior to the execution of the agreement, he told A. of his agent's agreement, and A. assented thereto; and that, after the execution of the agreement, A.'s agent told him that part payment should be so made, and that A. agreed thereto. The presiding judge refused to instruct the jury that if the agent had authority to make the agreement, they must find a verdict for A.; that a performance of the agreement by B. would not vest the title in him, and that A. would still have such title as would enable him to maintain his action; but instructed them that if the agent had authority to make the agreement, and B. performed it, then A. had no such title to the property as would enable him to maintain the action. *Held*, that the evidence was admissible, on the questions whether A.'s agent had authority to modify the written agreement, and whether he did modify it. *Held, also*, that A. had no ground of exception to the refusal to give the instructions requested, or to those given.

REPLEVIN of a sewing machine. At the trial in the Superior Court, before *Wilkinson*, J., the plaintiff offered in evidence the following agreement, signed by the defendant: "Office of S. L. Shaffer, general agent for Worcester County for the Singer Sewing Machine. Worcester, Mass., June 12, 1874. This is to certify that I have received of S. L. Shaffer one Singer Sewing Machine numbered 983381, 777381, with the appurtenances thereto belonging, delivered to me that day, under a contract

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for the sale thereof; and for which I will pay the sum of twenty-five dollars on 20th inst., and have furthermore given my note for eighty dollars, payable in four equal monthly payments at the office of said S. L. Shaffer, in the city and county of Worcester, Mass., on the twentieth day of each successive month from this date. And it is mutually agreed and understood that when the sum of eighty dollars shall have been paid by said monthly payments, I am entitled to and shall receive a good and effectual bill of sale thereof. But in case of failure to make said payments or any of them, I hereby agree to deliver up said machine to the said S. L. Shaffer, or his order, in as good condition as the same now is, reasonable use and wear thereof excepted; in which case, or in case of a violation of any of the agreements herein mentioned, I hereby authorize, empower and direct the said S. L. Shaffer or his agents, to enter the premises wherever said machine may be, and take and carry the same away; and I hereby exonerate the said Shaffer, his servants and agents, of and from all and any claim for damages which I might have against said Shaffer, his servants and agents, or any or either of them, for so doing; it being agreed by the parties hereto, that until the full price of said machine has been paid as above, it is the property of S. L. Shaffer, and is not to be removed from my present residence in Millbury, without his consent, nor be secreted, disposed of, underlet, or attempted to be sold, nor be injured by misuse or neglect, or by improper management."

The plaintiff also offered evidence tending to prove the payment of $58, and no more, a demand made upon the defendant for the machine, and a refusal by him to deliver the same to the plaintiff. On cross-examination, the plaintiff denied that the defendant, at an interview prior to the date of the agreement, told him that his agent had agreed to take part payment for the machine in work, and that he had then agreed with the defendant that part payment might be so made.

The defendant introduced evidence tending to show that the machine was delivered to him by the agent of the plaintiff at a time prior to the date of the agreement, and that, at the time of the delivery, the agent agreed to take in part payment certain labor performed by the defendant for the agent; and that, prior to the execution of the agreement, he told the plaintiff that his

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agent had agreed that the defendant's bill against the agent should be applied in part payment of the price of the machine, and that the plaintiff had thereupon assented to the agreement. This evidence was, against the plaintiff's objection, admitted on the question whether the plaintiff's agent was authorized to take payment for machines in labor.

The defendant also offered evidence tending to show that, after the execution of the agreement, the agent of the plaintiff said to him that his bill against him should be applied in part payment of the price of the machine, and that the plaintiff had agreed that such application should be made. The judge admitted the evidence, against the plaintiff's objection.

The plaintiff asked the judge to instruct the jury as follows. "If the jury find that the plaintiff's agent had authority to agree to apply the defendant's bill against him as part payment for the machine, and as part performance of his agreement, then they must find for the plaintiff; that a performance of his agreement did not vest the title in the defendant; and that, notwithstanding the performance of the agreement, the plaintiff would still have such title as to enable him to maintain his action."

The judge refused so to rule, but instructed the jury that if the agent of the plaintiff had authority to make the agreement testified to by the defendant, and the defendant had performed the agreement, then the plaintiff had no such title to the property as would enable him to maintain this action. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. Hopkins, for the plaintiff.

F. T. Blackmer, for the defendant.

By the Court. The defendant received the property under a conditional sale, by the terms of which the title was to vest in him on payment of the price. Although the original contract was in writing, the manner of payment might be modified by subsequent agreement. The questions at the trial appear to have been, 1st, whether the plaintiff's agent had authority to modify the manner of payment; and, 2d, whether he did agree to such modification after the execution of the original contract. The earlier part of the evidence objected to was competent upon

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the first question, and the latter part upon the second question. There was no error in the refusal to give the instructions requested, or in the instructions given. *Exceptions overruled.*

CHARLES N. PROUTY, administrator, *vs.* JONAS WILSON.
SAME *vs.* LAURINDA W. CRAWFORD, administratrix.

Worcester. October 2. — 3. 1877. ENDICOTT & LORD, JJ., absent.

In an action on a promissory note by the administrator of the payee there was evidence that, on the death of the payee, the note, in a division of the personal property made before the appointment of the administrator, fell to a daughter, who by an agent demanded of the principal maker payment of the note; that the maker replied that it was not convenient for him to pay it but agreed to pay interest at eight per cent; that the agent thereupon wrote the words "at eight per cent" on the note in the presence and with the assent of the maker; that a surety on the note, when told of the maker's agreement, after his death, and when shown the note so altered, paid the interest at eight per cent. *Held*, that the legal title to the note was in the administrator, and that he could maintain an action upon it. *Held, also*, that the evidence would warrant the jury in finding that both the maker and the surety assented to and ratified the note in its altered form, and thereby agreed to pay the same to the lawful holder for the sufficient consideration of an agreement to forbear, and an actual forbearance, by those who apparently had the actual control of the note and the equitable interest therein.

TWO ACTIONS OF CONTRACT, by the administrator of Isaac Prouty, upon the following promissory note, signed by Samuel Crawford and Jonas Wilson. "Spencer, January 10, 1863. For value received I Samuel Crawford as principal, and I Jonas Wilson as surety, jointly and severally promise to pay Isaac Prouty or his order four hundred dollars on demand with interest at 8 per cent." Writs dated November 4, 1875. The cases were tried together in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

The defendant in the second case is the administratrix of Samuel Crawford, who died in 1874.

The plaintiff admitted that the note had been altered by adding the words "at 8 per cent.;" and introduced evidence tending to show that Isaac Prouty died on January 27, 1872, and the plaintiff was appointed administrator on April 2, 1872 that

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before February 5, 1872, Isaac Prouty's children made a division of the personal property among themselves, and the note in question fell to Mary Prouty; that on February 5, 1872, Samuel Crawford came to the house where Mary Prouty and her brother Jason lived, to pay his interest, which he was then paying at the rate of $7\frac{3}{10}$ per cent., by an agreement which had been made between him and Isaac Prouty; that on February 5, 1872, Jason Prouty, acting for his sister and in her presence, told Crawford that they should like the principal of the note, to which Crawford replied, that it was not convenient for him to pay it, and Prouty said they ought to make their money pay more than $7\frac{3}{10}$ per cent., and Crawford agreed to pay eight per cent.; that Jason Prouty thereupon in Crawford's presence, and with his assent, wrote upon the note the words "at 8 per cent.;" that Crawford before the next payment of interest died; and that the next payment of interest was by Crawford's son.

The plaintiff also introduced evidence tending to show that the last payment of interest was made by the defendant Wilson; that he went in September 1874, to pay the interest, and desired to look at the note, which was shown him by Jason Prouty again acting for his sister and in her presence; that Wilson remarked that the note was written to be at six per cent.; that Jason Prouty said "Yes," but that two years before an agreement was made with Crawford to pay 8 per cent., and that he then made the alteration; that Jason Prouty then related to Wilson what was said and done at the interview between him and Crawford on February 5, 1872, as above recited; and that then Wilson paid the interest at 8 per cent., and Jason Prouty indorsed it on the note in Wilson's presence.

Evidence was introduced for the defendants, contradictory of the plaintiff's testimony on various material matters of fact, but there was no further or other evidence than the above, tending to sustain the plaintiff's claim.

The defendants asked the judge to rule that there was no evidence in the case that would authorize the jury to find a verdict for the plaintiff; that the fact that the note was altered after the death of the plaintiff's intestate under the circumstances developed by the evidence would prevent the plaintiff from recov-

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ering; and that there was no evidence of any considera ion for the alteration and increased rate of interest, so far as Jonas Wilson was concerned, to entitle the plaintiff to recover as against him.

The judge refused so to rule; but instructed the jury that there was evidence on which they might be authorized to find a verdict in each case; that the fact of the alteration having taken place after the death of the plaintiff's intestate would not prevent a recovery; that, although it was necessary for the plaintiff to show a consideration for an increased rate of interest, there was evidence of an agreement of forbearance which would be a sufficient consideration in both cases. The jury returned a verdict for the plaintiff in each case; and the defendants alleged exceptions.

G. F. Verry & F. A. Gaskill, for the defendants.

W. S. B. Hopkins, for the plaintiff, was not called upon.

By the Court. The legal title in the note was in the administrator of the payee. The evidence warranted the jury in finding that both the defendants assented to and ratified the note in its altered form and thereby agreed to pay the same to the lawful holder, for the sufficient consideration of an agreement to forbear and an actual forbearance by those who apparently had the actual control of the note and the equitable interest therein. *Exceptions overruled.*

Evelina E. Harding *vs.* Warren Colon.

Worcester. October 2. — 3, 1877. Endicott & Lord, JJ., absent.

If a promissory note, not negotiable, is given to a married woman by a third person in consideration of her husband's giving up to him a like note, and she transfers the note, with her husband's consent, to a creditor of his, in fraud of other creditors, the maker, in an action upon it in her name, cannot take advantage of that fact.

Contract upon the following instrument, signed by the defendant: "$120.00. East Templeton, Mass., February 1, 1870. For value received I promise to pay on demand Evelina E. Harding one hundred and twenty dollars with interest until paid."

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Writ dated January 6, 1876. At the trial in the Superior Court, before *Brigham*, C. J., the following facts appeared:

The plaintiff is the wife of John H. Harding. About six weeks before the date of the note, John H. Harding and the defendant owned a horse and sleigh together, and John H. Harding sold his half of the same to the defendant for $120, and in payment took the promissory note of the defendant for that amount, and the defendant then had full possession of the horse and sleigh. On February 1, 1870, John H. Harding, at his own suggestion, gave up the note to the defendant, and the defendant in consideration therefor, and at the request of John H. Harding, gave to the plaintiff the note in question, and without any new or additional consideration from the plaintiff. At the date of the note, John H. Harding was owing some $900, which he was unable to pay, and had as much due him which he was unable to collect.

In the spring of 1874, the plaintiff indorsed the note in question to Joel Baker, under the following circumstances: Joel Baker had previously, for the accommodation of the plaintiff's husband, indorsed his note for $200, receiving, as security therefor, a piano belonging to the plaintiff, and when the same became due paid it, and thereupon the plaintiff indorsed to him the note in question, and John H. Harding paid him $80 in cash, in payment of the $200. In September, 1875, Joel Baker sold the note in question to his son, Leonard M. Baker, and indorsed the same to him; and this action is brought in the interest of Leonard M. Baker, who was the owner of the note declared on the day this action was brought. The defendant promised Joel Baker and Leonard M. Baker, on several occasions, to pay to them the note. Joel Baker, when he received from Harding the note in question, did not notice that the same was not negotiable, nor did Leonard M. Baker notice that fact when he received the note from Joel Baker.

By consent and at the request of the parties, the judge, before verdict, reported the case for the consideration of this court. If the action could be maintained, judgment was to be rendered for the plaintiff for $120 and interest; otherwise, for the defendant.

T. B. Dunn, for the plaintiff.

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S. Cady, for the defendant.

BY THE COURT. The note in suit was not given to the nominal plaintiff by her husband, but by a third person in consideration of the husband's giving up to him a like note; and the equitable right in it was transferred by her with her husband's consent to the real plaintiff, a creditor of the husband. If this transfer was in fraud of other creditors, which hardly appears, the defendant cannot take advantage of it.

Judgment for the plaintiff.

SARAH K. HADLEY *vs.* CITIZENS' SAVINGS INSTITUTION.

Worcester. October 3.—17, 1877. ENDICOTT & LORD, JJ., absent.

On a complaint under the mill act, objections that the respondent had a prescriptive right to maintain its dam and that there was no mill existing, to the description of the land in the complaint, and to the sufficiency of the service, must be pleaded in bar and decided by the court before the issuing of a warrant, and cannot be made for the first time after the return of the verdict of a sheriff's jury into court.

A motion for a new trial is addressed to the discretion of the court, and no exception lies to its exercise.

On a complaint under the mill act, describing the land flowed as conveyed to the complainant by a certain deed, which referred to other deeds for a description of the land, a witness may testify at the trial before the sheriff's jury that he knew what land the deeds conveyed and that it was the land flowed, although the other deeds are not put in evidence.

COMPLAINT under the mill act, alleging that the respondent flowed the complainant's land in Blackstone, by means of a dam maintained by it across Mill River, and that the complainant was seised and possessed, among other land damaged thereby, of "all the land conveyed in a deed from Welcome A. Thayer to said complainant on the easterly side of said river, dated June 9th, 1857, recorded in said registry, book 583, page 274." In the Superior Court, the respondent was defaulted and a warrant was issued, describing the land in like terms, for a jury to hear and determine the matter of the complaint.

At the trial before the jury, the respondent objected to the introduction of any evidence tending to show damage to the land above mentioned, on the ground that it was not sufficiently de-

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scribed; but the presiding officer allowed the complainant, against the respondent's objection, to read that deed for the purpose of showing what land it described. The deed conveyed to the complainant a parcel of land, but gave no boundaries, and referred to other deeds for a description of the premises, which deeds were not produced. The complainant called her husband, as a witness, who was allowed to testify, against the respondent's objection, that he knew what land was conveyed in said deeds, that it was a parcel containing fifty-five to sixty acres, and extended to and was bounded by the middle of Mill River on one side, and was overflowed and damaged by the respondent's dam. It appeared that the respondent's dam had been maintained at or near its present height for the last fifty or sixty years, and had been used during that time in connection with a mill, which had been burned down two years before. The jury returned a verdict for the complainant.

Thereupon in the Superior Court the complainant moved that the verdict be accepted and confirmed. The respondent filed the following plea in abatement:

"And now the said Citizens' Savings Institution, a corporation duly established as alleged in said complaint, comes by C. G. Keyes, its attorney, and says that this court ought not to have or take any further cognizance of the complaint aforesaid.

"First. Because it says that it, the said Citizens' Savings Institution, is a corporation duly established by law in the State of Rhode Island, and has its usual and only place of business in Woonsocket, in said State of Rhode Island, and has not and never had any place of business within, and is not and never was subject to, the jurisdiction of this court upon said complaint. And this the said corporation is ready to verify.

"Second. Because it says it had not at the time of bringing said complaint and has not now and never had, owned, used or maintained a certain water-mill and a dam to raise water for working it as alleged in said complaint or otherwise, and because it never owned, erected, used or maintained any water-mill or any dam to raise water for working any such water-mill across Mill River named in said complaint or elsewhere within the jurisdiction of this court. And this the said corporation is ready to verify.

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"Third. Because it says that there was no sufficient and lawful service of said complaint, in that no copy of said complaint was ever left at any mill, and no copy of said complaint was ever served or left with said corporation as required by the provisions of chapter 149 of the General Statutes in such case provided. And this the said corporation is ready to verify.

"Fourth. Because it says that the supposed damages alleged in said complaint (if any such have ever accrued or happened to the said Sarah K. Hadley) are not recoverable under or by said complaint, for the reason that said corporation never had, owned, used or maintained any water-mills in connection with the dam mentioned in said complaint, and does not intend to erect, use or maintain any such mill, and that said dam has not been used or maintained by said corporation to raise water for working any such mill.

"Wherefore the said corporation prays judgment whether this court can or will take further cognizance of the complaint aforesaid."

The respondent also moved that the default be taken off; and that a new trial be granted.

Brigham, C. J., overruled the respondent's plea and motions; and ordered that the verdict be accepted. The respondent alleged exceptions.

C. G. Keyes, for the respondent.

T. G. Kent, for the complainant.

GRAY, C. J. Upon a complaint under the mill act, every matter which shows that the complainant cannot maintain his suit, except the question whether he has sustained any damages, must be pleaded in bar and decided by the court before the issue of the warrant for a sheriff's jury. Gen. Sts. *c.* 149, § 8. *Charles* v. *Porter*, 10 Met. 37. *Howard* v. *Proprietors of Locks & Canals*, 12 Cush. 259. *Darling* v. *Blackstone Manuf. Co.* 16 Gray, 187. The objections that the respondent had a prescriptive right to maintain its dam and that there was no mill existing, as well as those to the sufficiency of the description of the land in the complaint, and to the sufficiency of the service, were waived by omitting so to plead them, and by appearing, without protest, before the sheriff's jury, and taking the chance of a favorable verdict, and could not be made for the first time after the return

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of the verdict into court. In *Fitch* v. *Stevens*, 4 Met. 426, cited for the respondent, the defendant, who was allowed, in answer to an action to recover the damages assessed by the sheriff's jury, to show that no mill had ever been built, was not a party or privy to the proceedings on the complaint.

The motion for a new trial was addressed to the discretion of the court. The testimony of the complainant's husband was admissible to identify the land flowed.

Exceptions overruled.

ATTORNEY GENERAL *vs.* ALBERT BUTLER & others.

Worcester. October 4, 5.— 18, 1877. ENDICOTT & LORD, JJ., absent.

A testator by his will gave $500 to "the trustees of the high school in D. or their successors in office," "to be applied by said trustees to the advancement of education in said high school." The testator died in 1850, and the trustees invested the fund. The high school was maintained by a voluntary association formed in 1846, acting through trustees, which at that time built, in accordance with an agreement with the inhabitants of the town of D., an additional story upon their new school house "to be used for a select school and other purposes in such manner as not to incommode" the school district. In 1846 or 1847 the association employed teachers, caused to be kept in the building a private select school, in which were taught the branches of education usually taught in high schools of that time, charged tuition fees which mainly supported the school, and continued to keep the school in substantially the same manner during some part of every year from 1847 until 1866. In 1866, the town established a high school under the Gen. Sts. c. 38, § 2, and the association at the same time discontinued its school, and from that time annually until 1875 leased its upper story and hall to the town, at a rent of $80, for the purpose of keeping a high school, reserving the right to use it for other purposes not inconsistent therewith. In 1875, the trustees, acting under a vote of the association, expended $300 out of the fund given by the testator, being the only appropriation of the fund made, and $100 additional, in necessary repair of the hall for the use of the school, the association acting in good faith and in the belief that it was thus carrying out the donor's intention. The association had since leased the hall to the town at an annual rent of $100, which was a reasonable rent, with the understanding that the association should restrict its use of the same, when not needed by the school, to lectures and musical rehearsals, the trustees, though they never so stated to the town, considering it less than its rental value, but preferring to so rent it for the advancement of education in the town rather than at a higher rent for other purposes. *Held*, on an information in equity, at the relation of the town, to compel the trustees to pay over the fund, that, even if the trust was a public charity, no ground was shown for controlling the discretion of the trustees, by compelling them to make an immediate expenditure of the mod

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erate sum remaining in their hands or of the rent to be received by them annually from the town, rather than to allow the fund to accumulate to be applied as future necessities or contingencies might arise; and that the town should pay the costs of the information.

INFORMATION IN EQUITY by the Attorney General, at the relation of the inhabitants of the town of Douglas, alleging that Ezekiel Wood, a wealthy and benevolent citizen of the town, having at heart the interest of education, in 1849, signed and delivered to Albert Butler and others, all of Douglas and known as and called the trustees of the high school in Douglas, the following agreement in writing:

"Douglas, Mass., Nov. 13th 1849. For value received I promise and agree shall be paid out of my estate to the trustees of the high school in Douglas or their successors in office the sum of five hundred dollars, in the following manner, by my executors or administrators after my decease, as follows, to wit: One hundred dollars in one year after the appointment of said executors or administrators, and one hundred dollars per annum for the four successive years next thereafter, to be applied by said trustees to the advancement of education in said high school. And in case said school should not be kept the term of one whole year together during the five years in which said payments are to be made as aforesaid, then in that case this note, promise and agreement is to become null and void, and said payments become forfeited and go into my estate, to be administered by my said executors or administrators according to law and my will."

The information then alleged that by his last will, executed a few days afterwards, he provided as follows:

"It is my will that all my just debts and funeral charges be paid and discharged, by my executors hereinafter named and appointed, out of my estate, as soon as conveniently may be after my decease, including the payment of one certain note I have given to the trustees of the East Douglas High School in said Douglas, provided the stockholders and trustees are entitled thereto by complying with the terms and conditions of said note, and not otherwise."

The information also alleged that, before the making of the agreement and will, a high school had been and then was maintained in Douglas, by voluntary contributions of its citizens,

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which was kept in a building owned in whole or in part by the stockholders mentioned in the will; that the sum of $500 was paid over by the executors of the will to the trustees named and was invested by them; that before the year 1866 the trustees expended several sums in the advancement of education in the high school in question; that in 1866 the high school was discontinued, and the town, established a public high school under the Gen. Sts. *c.* 38, § 2; that the trustees had not expended any of the fund for the support of a high school, nor for the benefit of the town, since 1866; that the fund in 1875 amounted to $422.32, and in that year the trustees expended a large portion of that sum in repair of the school building, owned by them, which they had leased to the town at its full rental value, the town receiving no benefit thereby and the expenditure not being for the advancement of education; and prayed that the trustees might be decreed to make good the sum so expended by them and to apply the portion of the fund unexpended to the advancement of education in the public high school of the town or otherwise.

The case was heard and reserved, by *Endicott*, J., upon the information, answer, report of a master and an agreed statement of facts, for the determination of the full court, and is stated in the opinion.

W. S. B. Hopkins, for the Attorney General.

F. P. Goulding, *contra*.

GRAY, C. J. This case has no merits. The money was given to "the trustees of the High School in Douglas or their successors in office," "to be applied by said trustees to the advancement of education in said high school." The meaning of "high school" is well settled, in the laws and usages of the Commonwealth, to be a school in which higher branches of learning are taught than in the common schools. See Gen. Sts. *c.* 38, §§ 2, 3. The object of the testator was declared in general terms to be the advancement of such education in the town in which he lived, but he left the manner in which the fund should be applied to the discretion of the trustees.

The material facts, as they appear by the master's report, and by the allegations of the answer, which are admitted to be true, except so far as they are modified by the report of the master, are as follows:

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The testator died in 1850. The voluntary association, of which those to whom the fund was given and the defendants as their successors were elected trustees, and of which the testator in his lifetime was a member, was formed in 1846, by several citizens of Douglas, for the purpose of entering into an agreement with the inhabitants of the ninth school district in that town, "to build a second or additional story upon the schoolhouse then about to be built by said inhabitants, with a view to use said additional story for the purpose of affording to the youth of that community greater facilities for obtaining a higher literary education than could be obtained in the public town school; this object to be effected by means of a select private school, to be kept in said second or additional story;" and the association, by agreement with said inhabitants, accordingly built at an expense of $825 such a story upon their new schoolhouse, receiving from them a deed conveying the right to build and maintain said story according to the terms of the agreement, "to be used for a select school and other purposes in such manner as not to discommode said district."

"Immediately after the organization of said association and the completion of said building, in 1846 or 1847, the said association employed teachers, and caused to be kept in said building a private select school, which was attended by scholars resident in Douglas and in other towns near to Douglas. A tuition fee was charged and paid by the scholars attending said school, and the school was mainly supported by the proceeds of the tuition fees paid by scholars attending it. In said school were taught the branches of education usually taught in grammar schools or high schools of that time. Said school continued to be kept at the same place, under the direction and control of said association, and to be attended and supported in substantially the same manner as above stated, during some part of every year from 1847 until 1866."

In 1866, the town established a high school under the statutes of the Commonwealth; and the association at the same time discontinued its school, and from that time annually until 1875 leased its upper story and hall to the town, at a rent of $80, for the purpose of keeping a high school there thirty-six weeks in the year, reserving the right to use it for other pur-

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poses not inconsistent with the convenience of the schools kept in the building. In 1875, the trustees, acting under a vote of the association, expended the sum of $300 out of the fund given by the testator and $100 additional, for the purpose of repairing and fitting up the hall for the use of a school, and which by lapse of time and ordinary use had become necessary to put the hall in proper condition to carry out the original purpose of the association; and the association and the trustees, in thus appropriating the fund, acted in good faith, and in the full belief that they were thereby carrying out, in spirit and in letter, the purposes and intentions of the donor. The association has since continued to lease the hall to the town, at an increased annual rent of $100, for the same purposes, and with the like restriction and reservation, but with the understanding that the association should not use the room for other purposes so generally as before, but should restrict its use of the same, when not needed by the school, to lectures and musical rehearsals. The master finds that the rent of the premises for the purpose of a school, with the restrictions and reservations aforesaid, was always a fair and reasonable rent, and not below the rental value of the premises; but that the trustees, though they never so stated to the town, considered it less than the rental value, and preferred so to lease the premises for the use of a high school for the advancement of education in the town rather than at a higher rent for other purposes. There has been no other appropriation of the fund than as above stated.

Upon these facts, it is unnecessary to consider whether the trust created by the testator is a public charity or a private trust; for, assuming it, as is contended by the relators, to be a public charity, there is no ground for the information. The use which the trustees have made of the fund is admitted to have been in good faith, and is in our opinion according to the intention of the testator; and there is nothing shown, which should induce the court to control the discretion of the trustees, by compelling them to make an immediate expenditure of the moderate sum remaining in their hands, or of the rent to be received by them annually from the town, rather than to allow the fund to accumulate to be applied as future necessities or contingencies may require.

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The case is one to which the words of Lord Hardwicke are peculiarly applicable: "This then being an unnecessary information, and in contradiction to the right, the relators must pay the costs thereof. Nothing should be more discouraged than the bringing informations colorably for the benefit of a charity, but contrary to the real charity." *Attorney General* v. *Smart*, 1 Ves. Sen. 72. "The main object of having a relator," said Lord Gifford, "is to secure to the defendants the costs of the information, in case it should turn out that the information was improperly filed." *Attorney General* v. *Vivian*, 1 Russ. 226, 236. *Information dismissed, with costs.*

SIMEON A. BRITTON & others *vs.* COUNTY OF WORCESTER.

Worcester. October 3, 1876; October 6. — 22, 1877.

A bill of exceptions, alleged by the respondent at the trial upon a petition to the Superior Court to assess the damages caused to the estate of three petitioners, owned by them in common, by relocating a highway, stated that the respondent offered to prove that, at a hearing before the county commissioners, before the order of relocation was adopted, one of the petitioners verbally agreed that the petitioners would accept a certain sum in full for damages to their estate; that the respondent also offered to prove by another witness that he, by authority of two of the petitioners, informed the county commissioners that if a certain location was adopted, (which was afterwards in fact adopted,) the petitioners would accept the same sum in full for damages; and that, the respondent not proposing to show that the third petitioner gave any authority to make either offer, the judge rejected the evidence. *Held*, that no ground of exception appeared.

PETITION to the Superior Court, filed October 29, 1874, by Simeon A. Britton, Sarah A. Britton and Sarah M. Shattuck, for a jury to assess damages occasioned to the petitioners' real estate, owned by them in common, by relocating and changing the grade of Lincoln Street in Worcester.

At the trial, before *Gardner*, J., it appeared that on November 1, 1873, the county commissioners, upon the petition of Edwin Conant and others, adopted an order relocating and lowering the grade of Lincoln Street, through the petitioners' estate, and taking for that purpose 14,600 square feet of their land, and assessing their damages at $300.

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The petitioners claimed damages for the land taken, for the expense of moving a barn standing on the land, and for injury to the estate caused by the lowering of the grade of the street, and they introduced evidence to prove that the land was worth three cents a foot, and also as to the other damages claimed. The evidence introduced by the parties was conflicting as to whether the petitioners' estate derived benefit from the change in the street. Simeon A. Britton, one of the petitioners, testified that it cost $400 to move the barn, and this was not controverted by the respondent. Britton did not testify as to the damages to the estate, except as above.

The respondent called as a witness William O. Brown, one of the county commissioners, and offered to prove by him, that, at the hearing upon the petition of Conant and others, and before the order relocating the street was adopted, Britton appeared and verbally consented and agreed that the petitioners would accept $300 in full for the damages to their estate on account of the relocation and change of grade of the street. The respondent also called as a witness Charles W. Burbank, a surveyor, who testified that, acting under the direction of Simeon A. Britton and Sarah A. Britton, and while Conant's petition was pending, he staked out a location of Lincoln Street, through the premises in question, varying somewhat from a location which had previously been staked out by the city engineer, and that his location was substantially adopted; which testimony was admitted without objection. The respondent "then offered to prove by Burbank that, while the petition was pending, by the same authority, he informed the county commissioners that if his location was adopted, instead of that of the city engineer, the petitioners would accept $300 in full for their damages; but, as the respondent did not prove, or offer to prove, that either Simeon A. Britton or Burbank was authorized to act for Sarah M. Shattuck, and, as the respondent's counsel, when inquired of by the court, stated that he did not propose to show such authority," the judge excluded the evidence of Brown and Burbank. The jury returned a verdict for the petitioners for $850.49; and the respondent alleged exceptions.

The case was argued in October, 1876, and reargued in October, 1877.

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T. L. Nelson, for the respondent. It was decided in 1831, that one tenant in common of land, over which a highway is laid out, could not apply for a jury without the joinder of the other cotenants, and that the assessment of damages must be joint, and could not be severed by the jury. *Merrill* v. *Berkshire*, 11 Pick. 269, 274. But, since the Revised Statutes, parties having different interests in land are not obliged to join, but may apply separately; and, when they do join, their damages may be assessed separately. Rev. Sts. *c.* 24, §§ 48–53. Gen. Sts. *c.* 43, §§ 53–58. *Dwight* v. *County Commissioners*, 7 Cush. 533. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385, 387. *Ashby* v. *Eastern Railroad*, 5 Met. 368, 372. The testimony of Brown and Burbank was therefore admissible as affecting the damages to be awarded to the two Brittons. Had this testimony been admitted, separate verdicts could have been rendered.

F. T. Blackmer, for the petitioners.

By the Court. The evidence offered was not, and is not contended to have been, competent for the purpose of proving a valid agreement between the parties; and, in the opinion of a majority of the court, the bill of exceptions does not show that it was offered for any other purpose. *Exceptions overruled.*

Sarah E. Tainter *vs.* City of Worcester.

Worcester. October 6. — 30, 1877. Endicott & Lord, JJ., absent.

A city, by accepting a statute authorizing it to make and maintain reservoirs and public hydrants "in such places as may be deemed proper," and building its works under it, is not liable to an owner of property destroyed by fire by reason of its neglect in cutting off the water from a hydrant, but for which the fire might have been extinguished.

The owner of a building failed to pay water-rates for water supplied to his building by a city, and the city cut off the water from the building and from a hydrant in a street near by, although the water might have been cut off from the building alone. The building was destroyed by a fire, which might have been extinguished, had there been water in the hydrant. *Held*, that the owner of the building could not maintain an action against the city for the loss.

Authority given by a city council to a committee thereof, on a petition for a hydrant to be attached to a certain line of pipes, to purchase the pipes, does not authorize the committee to agree in behalf of the city to maintain the hydrant.

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CONTRACT, with counts in tort, for injuries sustained by the destruction of the plaintiff's mill by fire. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff put in evidence tending to show that she was the owner of a certain mill in the city of Worcester, which was destroyed by fire on June 17, 1874; that the fire, when first discovered, could have been extinguished, without the mill receiving material injury, if there had been water in a certain hydrant in a street near the premises; and that the loss occurred by reason of this absence of water.

The plaintiff also put in evidence tending to show that the defendant had accepted the St. of 1864, *c.* 104, authorizing the introduction of water into the city; and had, under the authority of the same, introduced water and laid pipes through the streets of the city, and adopted certain ordinances, the material parts of which are stated in the margin;* that the plaintiff, by

* Chapter 56, Section 2. "He [the water commissioner] shall clear all hydrants of snow after each snow-storm, and be vigilant and watchful in keeping them at all times in complete working order, and free from obstruction to their ready use, and shall also see that all gates and other fixtures are properly protected from injury and kept in working order."

Section 4. "He shall not shut off water from any line of water-pipe or service except by an order from the committee on water, or city engineer, or in case of a burst or leak in a distributing or service pipe."

Section 6. "All service pipe and its appendages, laid in the highways, shall be furnished and maintained at the expense of the city."

Section 11. "The water commissioner or his agent shall have access at all times to all premises where water is used, for the inspection of the condition of the fixtures, or setting, using or repairing meters, and also for cutting off the water from any delinquent taker by closing any faucet or cutting any pipe or pipes necessary to effect the object desired."

Section 14. "If the bills for water are not paid on or before the tenth day of May by any person taking water, or any bills for service pipe or other materials and labor furnished any taker or other person by the department, remaining unpaid for forty days, after notice from the city treasurer that the said bill is in his office and ready for payment, five per cent. per month shall be added to said bill for cost of collection, or for any violation of this ordinance, shall render said delinquent or violator liable to have the water shut off from his premises upon order from the committee on water, in which case the water will not be turned on again until all bills are paid, and, in addition thereto, two dollars for the expense of shutting off and letting on the water."

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her agent, Daniel Tainter, applied by petition to the city council to put in the hydrant, above referred to, to be used for extinguishing fires, which petition was referred by a vote of the council to the committee on water, on April 12, 1869, and the committee on September 16 following made the following report: "On petition of Daniel Tainter to be furnished water for his new mill on Gardner Street, the committee report that the pipe was laid in said street in 1864 by the Adriatic Mill Company, and that it is important for the purposes of Mr. Tainter and other parties wanting water upon this line that the city should own the pipe laid by this company;" that it was thereupon ordered by vote of the council that the committee on water "be authorized to purchase the pipe laid by the Adriatic Mill from Main Street to Southgate Street," which is the pipe to which the hydrant is attached; that in pursuance of this authority, the committee purchased the pipe for the city and verbally agreed with the plaintiff to put in the hydrant and connect the same with the aqueduct and keep the same supplied with water for the purpose of extinguishing fires, the same to remain under the control of the city for public use, provided the plaintiff would pay for the same; that the hydrant was put in by the committee and connected with the pipe, and the plaintiff paid therefor between $200 and $300; that the plaintiff also at her own expense put water-pipes into her building, and, with the consent of the committee, connected them with the pipes passing through the hydrant; that, the plaintiff having failed to pay water-rates for the use of the water on her premises, the water was cut off on May 23, 1874, as provided in the city ordinances, from the hydrant and the pipes in her building, by order of the committee on water; that the fire occurred while the water of that year was so cut off; that the plaintiff had never paid her water-rates due at the time the water was so cut off; that the pipes were so arranged that the water could have been conveniently cut off from the pipes in the building without cutting it off from the hydrant; and that there was an abundant supply of water in the pipe, to which the hydrant was attached, at the time of the cutting off and also at the time of the fire, and there was no reason for not supplying water to the hydrant, except that the plaintiff had failed to pay her water-rates, which water

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rates were for water supplied for the ordinary uses of the plaintiff's mill, and not for water supplied to the hydrant.

Upon the foregoing evidence the plaintiff contended that the jury would be authorized to infer an agreement by the defendant to maintain a reasonable supply of water to the hydrant for protection against fire, and also that she would be entitled to recover independently of any such agreement.

The judge ruled that the action could not be maintained. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

G. F. Hoar & G. F. Verry, for the plaintiff. 1. The defendant was authorized, by the St. of 1864, *c.* 104, to bring water into the city, and to "make and maintain public hydrants." The powers granted by the act were, by § 4, to be exercised "by such officers, servants and agents, as the city council shall from time to time ordain, appoint and direct." By the St. of 1866, *c.* 199, § 15, the city council is required to elect annually a water commissioner. His duties are defined by *c.* 56 of the city ordinances, and among them is that of keeping the hydrants "at all times in complete working order, and free from obstruction to their ready use." If a bill for water is not paid, the water may be shut off from the premises of the delinquent by the water commissioner or his agent, to whom access to the premises is given, "by closing any faucet or cutting any pipe or pipes necessary to effect the object desired." §§ 11, 14.

Independently of the agreement which the city made with the plaintiff and violated, the defendant is liable. Having elected to avail itself of the right to make and maintain public hydrants, the city was acting as a corporate legal individual and not as a municipal government, and is responsible for any damage occasioned by a careless, negligent or improper execution of it. *Lancaster Canal Co.* v. *Parnaby*, 3 Per. & Dav. 162. *Atkinson* v. *Newcastle Waterworks*, L. R. 6 Ex. 404. *Child* v. *Boston*, 4 Allen, 41, 52. *Oliver* v. *Worcester*, 102 Mass. 489. *Emery* v. *Lowell*, 104 Mass. 13. *Young* v. *Boston*, 104 Mass. 95. *Metallic Compression Co.* v. *Fitchburg Railroad*, 109 Mass. 277. *Bailey* v. *Mayor &c. of New York*, 3 Hill, 531. *Mayor &c. of New York* v. *Furze*, 3 Hill, 612, 615. *Lloyd* v. *Mayor &c. of New York*, 1 Seld. 369. *Barton* v. *Syracuse*, 36 N. Y. 54. *McCarthy* v. *Syra-*

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ouse, 46 N. Y. 194. *Jones* v. *New Haven*, 34 Conn. 1, 14. *Pittsburgh* v. *Grier*, 22 Penn. St. 54. *Logansport* v. *Wright*, 25 Ind. 512. 2 Dillon Mun. Corp. (2d ed.) §§ 778, 802.

The defendant, in the management of the waterworks, although clothed with a public authority, was engaged in a business for its own profit and gain, and is liable for its contracts and torts, as a private person would be under like circumstances. It is not contended that the defendant would be liable for a failure to exercise, or for a failure committed in the exercise of, those powers, which may be denominated governmental or public; and it may be conceded that decrees establishing hydrants are in the exercise of discretionary and legislative power; but the methods and manner of their management, after they are established, the neglect to keep them in working order, the shutting off the water from them so as to render them useless, are all ministerial duties, the failure to perform which, or their performance in a negligent and improper manner, will render the city liable. These duties must be performed by agents or servants, and the doctrine of *respondeat superior* applies. Suppose the water commissioner, in cutting off the water, had negligently performed this duty, and had flooded a house with water, or had with his lanterns set fire to a house, would not the city have been liable? See *Danbury & Norwalk Railroad* v. *Norwalk*, 37 Conn. 109, 119.

2. The supply of water to the hydrant was cut off for the neglect of the plaintiff to pay the water-rates assessed, not for the use of the hydrant, but for the use of the mill. The defendant had a right to cut off the water from the mill, but not from the hydrant.

3. The plaintiff is also entitled to recover by virtue of her contract made with the defendant, through its agent, the committee on water. This contract was made for a valuable consideration, and the committee agreed that the hydrant should be kept for public use, and should be supplied with water for the extinguishment of fires. It was clearly within the province of the committee to provide hydrants for public or private use. The agreement to keep the hydrant supplied with water was as much within the committee's power, as an agreement to supply water to a house or mill for domestic or mechanical purposes.

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The city has accepted the benefits of the contract, by having the hydrant for the use of the public, and by receiving pay for its construction, and has thereby ratified the acts of its agents. *United States Bank* v. *Planters' Bank*, 9 Wheat. 904. *Peterson* v. *Mayor &c. of New York*, 17 N. Y. 449. *Hayden* v. *Madison*, 7 Greenl. 76, 79. *Abbot* v. *Hermon*, 7 Greenl. 118.

T. L. Nelson & F. T. Blackmer, for the defendant.

GRAY, C. J. This action is brought against the city of Worcester to recover damages suffered by the destruction of the plaintiff's mill by an accidental fire in consequence of the neglect of the city to maintain a hydrant by which the fire might have been extinguished. The declaration is in several counts, and no objection is made to its form, provided the plaintiff is entitled to maintain any action against the city upon the evidence stated in the bill of exceptions.

The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are therefore authorized by general laws to provide and maintain fire engines, reservoirs and hydrants to supply water for the extinguishment of fires. *Allen* v. *Taunton*, 19 Pick. 485. *Hardy* v. *Waltham*, 3 Met. 163. *Fisher* v. *Boston*, 104 Mass. 87, 93. The Worcester Water Act, St. 1864, *c.* 104, § 3, authorizes the city to make and maintain reservoirs and public hydrants "in such places as may be deemed proper." This evidently means "as may be deemed proper by the city or its officers or agents" — just as the St. 1867, *c.* 158, authorizes the selectmen of towns, for the protection of persons and property therein against fire, to order conductors to be put into the pipes of aqueduct corporations, for the purpose of attaching hydrants or conducting water into reservoirs, and in such places as the engineers of the fire department shall think necessary. The works to be constructed by the city of Worcester, under the St. of 1864, were, so far as related to safeguards against fire, to be erected and maintained by the city for the benefit of the public and without pecuniary compensation or emolument. The questions whether and where public hydrants should be erected were within the exclusive discretion and control of the municipal authorities, as the public interest might seem to them from time

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to time to require. The city did not, by accepting the statute and building its works under it, enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires, upon which an action can be maintained. *Grant* v. *Erie*, 69 Penn. St. 420. *Wheeler* v. *Cincinnati*, 19 Ohio St. 19. *Brinkmeyer* v. *Evansville*, 29 Ind. 187. *Fisher* v. *Boston*, *ubi supra*. *Hill* v. *Boston*, 122 Mass. 344.

The judgment of the Court of Exchequer in *Atkinson* v. *Newcastle Waterworks*, L. R. 6 Ex. 404, much relied on by the plaintiff, in which an action was maintained against a water company for not keeping pipes, in which fire plugs were fixed, charged with water at a certain pressure, as required by its act of incorporation, whereby the plaintiff's property was destroyed, has been reversed in the Court of Appeal, by Lord Chancellor Cairns, Chief Justice Cockburn and Lord Justice Brett. 2 Ex. D. 441. In *Metallic Compression Co.* v. *Fitchburg Railroad*, 109 Mass. 277, the action was not against the city for neglect to furnish proper means to extinguish fires, but against a third party for unlawfully cutting a hose while actually being used to put out a fire; and the decision of the Court of Exchequer in *Atkinson* v. *Newcastle Waterworks* was cited only to the point that the act of the defendant was the direct and efficient cause of the injury.

For the reasons already stated, the plaintiff has no right of action against the city, by reason of any duty imposed or liabil ity assumed under the St. of 1864, for neglecting to maintain the hydrant, or for cutting off its supply of water. And she cannot sue the city upon the alleged agreement of the committee, because the authority to purchase the plaintiff's pipe did not authorize them to agree in behalf of the city to maintain a hydrant, or to supply it with water, and there is no other evidence of any authority from the city to make such an agreement, or of any knowledge on the part of the city that such an agreement had been made. *Palmer* v. *Haverhill*, 98 Mass. 487.

Exceptions overruled.

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MARGARET DUFFEE *vs.* H. M. CALL.

Plymouth. Oct. 16. — 17, 1877. MORTON, LORD & SOULE, JJ., absent.

If a writ, duly served upon a person summoned as trustee of the principal defendant, is not entered, and he appears and files a complaint at the first term, he is entitled to judgment for his costs; and his right to file such a complaint is not affected by his having filed an answer.

COMPLAINT FOR COSTS, by a person duly summoned as trustee of Cynthia Hall, named as defendant in a writ sued out by H. M. Call and returnable at October term 1876 of the Superior Court.

The trustee appeared and filed an answer on the first day of the term, and afterwards discovered that the writ had not been entered, and thereupon and during the same term filed this complaint. No service was made upon the defendant; but the trustee was first informed of that fact after this complaint had been filed.

Allen, J., ruled that the complaint must be dismissed; and the complainant alleged exceptions.

C. G. Davis, for the complainant.

No counsel appeared for the respondent.

GRAY, C. J. If a writ duly served is not entered, the defendant, upon appearing pursuant to the summons served upon him and filing a complaint at the first term, is entitled to judgment for his costs. Gen. Sts. *c.* 120, § 12; *c.* 129, § 9. *Gilbreth* v. *Brown*, 15 Mass. 178, 180. *Lombard* v. *Oliver*, 5 Gray, 8. *Cardival* v. *Smith*, 109 Mass. 158, 160. And a person summoned as trustee of the principal defendant has the like right. Gen. Sts. *c.* 129, § 9. *Brown* v. *Seymour*, 1 Pick. 32. The filing of a trustee's answer, in an action which had been discontinued by the plaintiff's failing to enter it, was a nullity, and did not waive or affect the right of the trustee to file a complaint for costs at the term at which she had been summoned to appear.

Exceptions sustained.

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SALMON WASHBURN *vs.* M. J. CLARKSON & trustee.

Bristol. October 24. — 30, 1877. LORD & SOULE, JJ., absent.

In a trustee process, a person summoned as a trustee has a right to be heard on the validity of an assignment to an adverse claimant, and is entitled to costs while attending, for that purpose, the court in which it is pending.

APPEAL by the plaintiff from the taxation of costs in a trustee process. The case was submitted to the Superior Court, and to this court, on appeal, upon an agreed statement of facts in substance as follows:

The action was begun in the First District Court of Bristol. On the return day of the writ, the defendant was defaulted. The Old Colony Iron Company, summoned as trustee, appeared and answered that, at the time of the service upon it, it had no funds in its hands belonging to the defendant. Interrogatories to the trustee were thereupon filed by the plaintiff, and the trustee answered that at the date of the service there was due the defendant the sum of $43.20, which was claimed by one C. G. Washburn, by virtue of an assignment of the same to him by the defendant. Washburn was then admitted as adverse claimant, and, upon a trial of the issue thus raised, his claim was allowed, and the trustee discharged. From that judgment the plaintiff took an appeal, which was entered at September term 1875 of the Superior Court, and at September term 1876 a trial was had as between the plaintiff and the claimant, and, upon a finding by the jury that the assignment was valid, judgment was entered for the claimant, and the trustee discharged, with costs. No further interrogatories to the trustee were filed in the Superior Court. The claimant was allowed costs against the plaintiff. The trustee claimed and taxed against the plaintiff costs for the whole time the case was in the Superior Court, in addition to the costs taxed in the District Court.

The clerk allowed such costs to the trustee. The Superior Court affirmed the taxation of costs, at December term 1876, including costs for that term; and the plaintiff appealed to this court.

S. R. Townsend, for the plaintiff.

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H. J. Fuller, for the trustee.

GRAY, C. J. The issue whether the trustee should be charged or discharged depended upon the question whether the assignment to the claimant was valid. The trustee had therefore a direct interest in that question and a right to be heard upon it, and was entitled to costs while attending for that purpose the court in which it was pending. There is nothing to show that the amount of costs allowed him was unreasonable. The case differs from one where no claimant intervenes, and the whole litigation after the filing of the trustee's answer is between the plaintiff and defendant, in which the trustee has no occasion and no right to be heard. Gen. Sts. *c.* 142, §§ 60–62. *Croxford* v. *Massachusetts Cotton Mills*, 15 Gray, 70. *Morrison* v. *McDermott*, 6 Allen, 122. *Wasson* v. *Bowman*, 117 Mass. 91.

Taxation affirmed.

OWEN GOLDRICK *vs.* BRISTOL COUNTY SAVINGS BANK.

Bristol. October 25.—30, 1877. LORD & SOULE, JJ., absent.

A depositor in a savings bank, one of whose by-laws, contained in his deposit book, provides that, "as the officers of the institution may be unable to identify every depositor, the institution will not be responsible for any loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or part, on presentation," cannot maintain an action against the bank for an amount which, in good faith and without notice that the book had been stolen, it paid to a person who, fraudulently personating the depositor, presented the book and obtained the amount.

CONTRACT to recover $150 deposited by the plaintiff with the defendant. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found the following facts:

The plaintiff first deposited moneys with the defendant in January, 1864, and, from that time until July, 1874, made once or twice in each year deposits of money. The defendant's treasurer or clerks paid, on August 25, 1871, $100, and on September 25, 1871, $50, to a person, not the plaintiff, or authorized to have the plaintiff's bank book, or authorized to receive the money, who at those times exhibited to the defendant's treasurer or

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clerks the bank book, and requested and received payment of the money, giving to the defendant at the same time, in the plaintiff's name, a written acknowledgment on the books of the defendant of the receipt of the money. It did not appear in evidence who the person was who fraudulently personated the plaintiff, or whether the same person thus acted on both occasions in exhibiting the bank book and receiving the money. The plaintiff was not able to write his name, and was accustomed, when required to sign his name, to make his mark in the form of a cross. The person who obtained the money made a cross against the plaintiff's name, written by the defendant's treasurer or clerk, in acknowledging the receipt of the money on the defendant's books.

The plaintiff's bank book, on August 25, 1871, and on September 25, 1871, was kept by him in his trunk, in the house where he lodged, and had never to his knowledge been taken from the trunk, unless by himself. In October, 1872, a question arose between the plaintiff and the defendant as to the amount to be credited on the defendant's books for interest on his deposits, and, incidentally to this question, a dispute as to the amount of the principal sum of such deposits, upon which he was entitled to have interest computed; and then, for the first time, it was discovered by the plaintiff, as well as by the defendant, that the sum of $150 had been paid under the above circumstances. The person of the plaintiff, on August 25, 1871, and September 25, 1871, was not familiarly known to the defendant's treasurer or clerks, and at those times there were several thousands of persons with whom the defendant had occasion from time to time to transact business, in making and withdrawing deposits of money, in the ordinary course of its business.

Upon discovery of the payment of the money by the defendant to the person who fraudulently personated the plaintiff in obtaining the same, the plaintiff demanded it of the defendant, and, his demand being refused, brought this action.

The plaintiff's bank book, containing a copy of the defendant's by-laws, was introduced in evidence, one of the by-laws being as follows: "As the officers of the institution may be unable to identify every depositor, the institution will not be responsible for any loss sustained, when a depositor has not given notice of

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his book being stolen or lost, if such book be paid, in whole or part, on presentation."

The judge ruled upon these facts that the action could not be maintained, and ordered judgment for the defendant. The plaintiff alleged exceptions.

L. Lapham, for the plaintiff.

H. J. Fuller, (*E. H. Bennett* with him,) for the defendant.

MORTON, J. One of the by-laws of the defendant bank provides that, "as the officers of the institution may be unable to identify every depositor, the institution will not be responsible for any loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid, in whole or part, on presentation." When the plaintiff made his deposits, he assented to the by-law, and it thus became a part of the contract between the parties. The plain object of this by-law was to exonerate the bank from loss occasioned by the inability of its officers to identify the depositor, and to throw upon the depositor the risk of keeping his book safely.

The presiding judge, who tried the case at bar without a jury, was justified in finding, upon the evidence, that the bank in good faith and without negligence paid the amount which is sued for, upon presentation of the plaintiff's book, to some person who had stolen or otherwise obtained possession of it, and who fraudulently personated the plaintiff, no notice that the book was stolen having been given to the bank. This is exactly the case which the by-law was intended to provide for, and the plaintiff cannot recover without a violation of the terms of the contract which the bank made with him. *Wall* v. *Provident Institution for Savings*, 8 Allen, 96. *Levy* v. *Franklin Savings Bank*, 117 Mass. 448.

Exceptions overruled

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PHILANDER SMITH *vs.* ROLAND W. SNOW.

Dukes County. October 23. — 24, 1877. LORD & SOULE, JJ., absent.

A testator, by his will, devised to his wife "all my estate, both real and personal, that shall remain after the payment of my debts and funeral charges, for her comfortable support and maintenance during her life, with full power and authority to dispose of the same as she may find needful for that purpose." The will also devised to A. "all the estate, both real and personal, of which I shall die seised and possessed, after the death of my said wife, to him, his heirs and assigns forever, if he shall then be living." A. survived the widow, who made no disposition of the real estate in her lifetime, but by her will devised it to B. *Held*, that the widow took only an estate for life with a power to sell, and, that power not having been exercised in her lifetime, the devise over to A. took effect.

WRIT OF ENTRY to recover two parcels of land in Edgartown. Plea, *nul disseisin*. The case was submitted to the Superior Court, and to this court, on appeal, on an agreed statement of facts in substance as follows:

The will of Joshua H. Snow, who died seised of the demanded premises, contained the following clauses: "I give to my beloved wife, Lucinda N. Snow, all my estate, both real and personal, that shall remain after the payment of my debts and funeral charges, for her comfortable support and maintenance during her life, with full power and authority to dispose of the same as she may find needful for that purpose." "I give, devise and bequeath to Roland W. Snow all the estate, both real and personal, of which I shall die seised and possessed, that may remain after the death of my said wife, Lucinda N. Snow, to him, his heirs and assigns forever, if he shall then be living." The person named as Roland W. Snow was the tenant in this action.

Lucinda N. Snow, never having disposed of the demanded premises in her lifetime, for her support and maintenance, gave by her will to her brother, Philander Smith, the demandant, "all the rest and residue of my estate, both real and personal, that I die seised of."

On these facts, judgment was ordered for the tenant; and the demandant appealed.

J. Brown & L. E. White, for the demandant.

G. Marston, for the tenant.

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By the Court. The widow took under the will of her husband only an estate for life with a power to sell; and, that power not having been executed in her lifetime, the devise over to the tenant took effect upon her death. *Stevens* v. *Winship*, 1 Pick. 318. *Larned* v. *Bridge*, 17 Pick. 339. *Judgment affirmed.*

Joseph E. Putnam *vs.* Home Insurance Company.

Suffolk. March 14. — Oct. 19, 1877. Lord & Soule, JJ., absent.

In an action upon an oral contract of insurance, there was evidence that the plaintiff made an application for insurance to the defendant's local agent; that the local agent agreed to place at once a certain amount at a certain rate upon the risk and to bind it, and immediately made a memorandum to that effect in what was called his "binding-book;" that the policy was not to issue until a special agent of the defendant had inspected and approved of the risk, which was specially hazardous; that the local agent had authority in writing "to receive proposals for insurance," and was entrusted with blank policies signed by the defendant's president and secretary, which he was accustomed to fill out and deliver without consultation with them; that he had frequently, with their knowledge and consent, issued policies upon risks of the same class without submitting the same for their previous approval; and that there was a usage among insurance companies and their agents to bind the companies by preliminary oral agreements until policies could conveniently be issued. *Held*, that a jury would be warranted in finding that the local agent made an oral agreement of insurance within the apparent scope of his authority.

Contract. Writ dated August 18, 1875. The declaration alleged that on August 17, 1874, the plaintiff was the owner of a certain building situated in that part of Boston called South Boston, and numbered 636 on Second Street, and of the value of $10,000; that the defendant on said August 17, in consideration of a premium to be paid to it by the plaintiff, agreed to insure the plaintiff against loss or damage to the said building by fire, for twelve months from and including said August 17, in the sum of $1000; that the defendant neglected and refused to fulfil its said agreement, and that said property was totally destroyed by fire on September 5, 1874, of which loss and destruction the defendant had notice; that the defendant owed the plaintiff the sum of $1000 and interest. Answer, a general denial.

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At the trial in the Superior Court, before *Pitman*, J., the authority of the defendant's agents to make, and the question whether they in fact made, such a contract were the substantial issues.

It appeared in evidence that one Winward, a clerk of a firm of insurance brokers, acting in behalf of the plaintiff, on August 17, 1874, made an application for insurance on the plaintiff's building to the local agents of the defendant in Boston, whose printed certificate of appointment, signed by its president and secretary, and produced in evidence by the plaintiff, was as follows:

"Home Insurance Company, City of Columbus, State of Ohio. Be it known that Freeman & Vinton, of Boston, in the County of Suffolk and State of Mass., are appointed, and by these presents duly constituted, local agents of the Home Insurance Company, of Columbus, Ohio, with full power to receive proposals for insurance against loss and damage by fire and lightning, to receive moneys for the same, and countersign, issue, renew and consent to transfers of policies of insurance signed by the president and secretary of the said Home Insurance Company, and to make indorsements thereon, subject to the rules and regulations of said company and to such instructions as may from time to time be given by its officers. In witness whereof the said Home Insurance Company have caused their corporate seal to be affixed to these presents, and to be signed by their president and attested by their secretary in the city of Columbus, O., this tenth day of January, A. D. 1873."

Winward testified that he had been in the business nine years; that said local agents agreed to place at once $1000 in the defendant company and bind it, and that the agents forthwith entered in a book, which was called a binding-book, a memorandum of what was done; that the "form" of the policy was to be the same as in the Equitable Company, at the rate of five per cent.; that the agents had carried a policy on the same property in the Equitable Office for months; that no policy was to issue until one Balloch, the special agent having supervision of the defendant's business in New England, had seen the property and approved of the agents' writing a policy; that he talked with Freeman, who said that he would bind it in the de-

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fendant company; and that such an agreement takes effect the moment it is made.

The defendant's agents, called by the plaintiff, testified to the application in substantially the same terms; that the application was accepted, and they supposed the risk was bound in the defendant company; and that a policy was not to issue until approved by Balloch, upon his inspection of the property; and that there was a general usage among insurance companies and their agents to bind the companies by oral agreements until the policies could be conveniently issued.

Freeman testified that he had been the defendant's agent since 1869 or 1870; that he had previously insured this property in the Equitable Company, and was carrying a policy in that company at the time of the fire; that he had examined the property and was acquainted with the risk; that he was not limited to any particular risks; that application was made to him by Winward for this insurance; that he accepted it and made the memorandum in the binding-book; that there was a usage among insurance men that when so entered it was binding; and that he accepted it to hold till inspected by Balloch, the rate to be five per cent.

It also appeared that Balloch returned the day before the property was destroyed by fire, but did not inspect the property or approve the policy.

The book was produced in evidence, and contained the following memorandum:

"No. 447. Insurance is wanted by J. E. Putnam on Bldg Bbl Factory at 636 2nd St. S. Boston for $1000 = for 12 months from Aug. 17 1874. Binding in the Home Ins. Co. Hold for C. B. to inspect.

"Burned Sept. 5. *Agent.*"

It also appeared in evidence that this was a specially hazardous risk; that the local agents always had blank policies in their possession signed by the president and secretary of the company, and were accustomed to fill out and deliver the same without consultation with the officers of the company; that they had such policies at the time of this application and their action thereon, and could have filled the same out, but, instead of so doing, the issue of a policy was postponed for the approval of the special agent.

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The local agents also testified that they had frequently issued policies for risks of the same class as this with the knowledge and consent of the defendant's officers, without submitting the same to the previous approval of any officer, or agent of the company, and they had not in any instance made any oral contract, like the one in suit, for this company, when the issue of the policy was to be subject to the approval of any such officer or agent; that they were accustomed to bind the company until the policy could be conveniently filled out, and that said oral contracts were not for any limited number of days, but were indefinite and until the policy issued.

The plaintiff testified to his ownership of the property; that its value was greater than the total amount of insurance; and that it was entirely destroyed by fire on September 5, 1874.

The defendant offered no evidence, but requested the judge to instruct the jury that the action could not be maintained on this evidence; and that there was no evidence for the consideration of the jury that a contract was made as claimed, and that there was no evidence of any authority to make such a contract. The judge declined so to rule, and submitted the case upon instructions, among others not excepted to, which allowed the jury to pass upon the authority of the agents to bind the defendant, and upon the execution of the contract, as questions of fact.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. Russ, for the defendant. The plaintiff produced and relied upon a written authority given by the defendant, containing in printed terms the limit of authority granted by the company to the agents with whom the plaintiff alleges the oral contract was made. The familiar principle of law, that a plaintiff, in such case, may rely upon an apparent authority beyond the limits of that expressly granted, to be inferred from acts or usage, cannot apply in a case like this, where the plaintiff produces and relies upon an express authority in writing, the terms of which are in no sense ambiguous. *Murdock* v. *Mills*, 11 Met. 5. *Bryant* v. *Moore*, 26 Maine, 84, 87. *Towle* v. *Leavitt*, 3 Foster, 360, 374. *Delafield* v. *Illinois*, 26 Wend. 192. The authority granted is to receive proposals, sign, issue, renew and consent to transfers of policies signed by the president and secretary, and to make

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indorsements; and this authority was subject to rules and regulations of the company and to instructions of its officers.

An agent with a limited authority cannot exceed it, and, if he does, his principal will not be bound by his acts, unless he affirms them afterwards. *Fenn* v. *Harrison*, 3 T. R. 757. *Snow* v. *Perry*, 9 Pick. 539, 542. *Schimmelpennich* v. *Bayard*, 1 Pet. 264, 290. *Attwood* v. *Munnings*, 7 B. & C. 278.

The plaintiff's evidence expressly shows that the authority upon which he relied could not be enlarged by any rule, regulation or instruction unknown to him beyond the subject matter of signing, issuing, renewing, transferring and indorsing actual policies signed by the president and secretary. The party dealing with an agent, whose authority is limited, is bound to inquire and ascertain the extent of that authority. *Snow* v. *Perry*, 9 Pick. 539, 542. *Lobdell* v. *Baker*, 1 Met. 193, 201. *Dresser Manuf. Co.* v. *Waterston*, 3 Met. 9, 18. *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1, 29. *Hale* v. *Mechanics' Ins. Co.* 6 Gray, 169, 173. *Banorgee* v. *Hovey*, 5 Mass. 11, 37.

That the agency was one of special and limited authority, and so known to the plaintiff, appears from the existence of a supervising intervening agent whose approval was to be obtained before the contemplated policy was to be issued. The case finds, that the risk was specially hazardous, and the authority which the agent undertook to exercise was anomalous and extraordinary, *a fortiori*, the plaintiff was bound to see that such authority existed. Wharton on Agency, § 139.

There is no fact found, and no evidence offered, from which the plaintiff had a right to infer the existence of an authority to make this contract. It was not within the enumerated powers of his agency. It was an anomalous, extrahazardous risk. The usual evidence of a contract, viz., a policy, was not to issue without the approval of a superior agent. These agents had never before undertaken to make such a contract as this.

F. W. Hurd & E. P. Nettleton, for the plaintiff.

AMES, J. No attempt has been made, in the argument for the defendant, to maintain the position that its local agents did not make substantially the contract which the plaintiff alleges that they did make. The evidence reported certainly tends to show that there was an agreement to insure the building, which

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was intended to be binding upon the company from the moment of the entry upon "the binding-book;" and to continue in force at all events until the premises should be inspected by the special agent, Balloch.

The only question remaining to be considered is whether there was any evidence of authority on the part of the local agents to make the contract. It was conceded that they had authority to receive applications for insurance, and that they were entrusted with blank policies signed by the president and secretary of the company which they were accustomed to fill out and deliver without consultation with the officers.

There was evidence to the effect that, with the knowledge and consent of the defendant's officers, they had frequently issued policies upon property of the same class as this risk, without submitting the same for the previous approval of any of those officers. The tendency of this evidence was to show that they acted, and made contracts of insurance, as general agents of the defendants, and were allowed so to do. The fact that the delivery of the policy was delayed until the special agent should have an opportunity to inspect the building is explained by the fact that the risk was considered specially hazardous; and that the local agents left to the corporation the right of terminating the risk if the special agent should decide not to accept it. It would not follow that in the meantime the plaintiff was to stand uninsured. There is evidence that he considered himself, and was understood by the local agents, to be so insured; that the amount and the rate of premium were agreed upon; and that there was a usage among insurance companies and their agents to bind the company by preliminary oral agreements until policies could conveniently be issued. See *Baxter* v. *Massasoit Ins. Co.* 13 Allen, 320. It is well settled that an oral contract of insurance is binding, and that there is no rule of law requiring it to be in writing. *Sanborn* v. *Fireman's Ins. Co.* 16 Gray, 448. Under such circumstances, the plaintiff might have a right to rely upon the oral agreement, and for that reason might have failed to seek insurance elsewhere. The case finds that the instructions to the jury upon the general rules of law as to agency were not excepted to, and the jury may have found that the contract was within the apparent scope of the agent's employment.

Exceptions overruled.

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First National Bank of Northampton *vs.* Massachusetts Loan and Trust Company.

Hampshire. Sept. 18. — Nov. 15, 1877. Endicott & Lord, JJ., absent. Soule, J., did not sit.

A., by a contract in writing, pledged to B. certain tobacco, reciting that it was A.'s "own property and free from all incumbrance and all of the crop" of a certain year. B. borrowed money of C. and delivered the tobacco to him, and gave him an assignment of all his "right, title and interest in and under the contract together with all the property therein mentioned." *Held*, that there was no implied warranty of title to the tobacco or of its quality, between B. and C.

Contract upon an alleged warranty. At the trial in the Superior Court before *Allen*, J., without a jury, the following facts appeared:

On December 5, 1873, S. R. Bell & Company, in consideration of a loan of $9330, pledged to the defendant 180 cases of tobacco, and signed and delivered to the defendant a contract in which the tobacco was described as follows: "The same being our own property and free from all incumbrance, and all of the crop of 1871."

On March 1, 1875, the plaintiff paid the defendant the sum of $6646, and in consideration thereof the defendant signed and delivered to the plaintiff the following assignment of the contract above mentioned: "For value received, we hereby assign and transfer to the First National Bank of Northampton all our right, title and interest in and under the contract, together with all the property mentioned therein." On the same day, the defendant signed and delivered to the plaintiff a paper reciting the assignment of the contract of S. R. Bell & Co., and continuing as follows: "The said company has received therefor from said bank $6646, with the guaranty of the company to the bank that the above sum is the amount due on the contract."

The plaintiff offered evidence tending to show that, on payment of the money stated in the assignment, the 180 cases of tobacco were delivered to the plaintiff, and retained by it until sold in the fall of 1875; that in August, 1875, one J. H. Lyman demanded of the plaintiff seven of the cases of tobacco delivered to the plaintiff, alleging that it was his property, and had been pledged and transferred to the defendant without right

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that Lyman brought an action of tort against the plaintiff in the Superior Court, for the conversion of the seven cases, and recovered judgment, and that the defendant, though requested, refused to defend the case.

The plaintiff also offered evidence tending to show that of the 180 cases, there were sixty cases not of the crop of 1871, but of the crop of 1870, a crop well known to be inferior in quality and market value to that of 1871, in consequence of which the plaintiff sustained a loss of $1500.

The judge ruled that the assignment and guaranty contained no warranty of title to the seven cases of tobacco, or that the sixty cases were of the crop of 1871; that the evidence offered was therefore inadmissible, and found for the defendant. The plaintiff alleged exceptions.

C. Delano, (*J. C. Hammond* with him,) for the plaintiff.

H. D. Hyde, for the defendant, was not called upon.

AMES, J. We see no ground on which these exceptions can be sustained. The position of the defendant in relation to the property was that of a pledgee. It is urged that the goods, at the time of the transfer to the plaintiff, were in the actual possession of the defendant, but this fact does not vary the case. The written assignment does not purport to be a sale of the goods, but of all the defendant's rights under the contract, and its obvious purpose was to substitute the plaintiff in the place of the original pledgee. What the defendant undertook to convey was all its "right, title and interest in and under the contract, together with all the property therein mentioned." The only express guaranty entered into by it was as to the amount remaining due upon the original contract. If, in addition to this, any guaranty can be said to have been implied, it certainly could not go beyond an assurance that it had not released or impaired any of its rights as pledgee, and that, for aught it knew to the contrary, the property was what the contract purported. 2 Addison on Con. (3d Am. ed.) § 614. In a conveyance of all of any party's right, title and interest in any subject matter, any warranty, express or implied, must be understood as limited by the granting clause, unless otherwise distinctly provided. *Allen* v. *Holton*, 20 Pick. 458. *Hoxie* v. *Finney*, 16 Gray, 332.

Exceptions overruled.

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E. W. LINDSEY *vs.* JAMES STONE.

Hampshire. Sept. 18. — Nov. 24, 1877. ENDICOTT & LORD JJ., absent.

Since the repeal of the St. of 1869, c. 415, § 63, an action may be maintained to recover the price of intoxicating liquors, sold in another state, while that statute was in force, by a person who had reasonable cause to believe that the buyer intended to bring them into this Commonwealth to be here kept or sold in violation of law.

CONTRACT on an account annexed for the price of certain intoxicating liquors sold by the plaintiff to the defendant in April and May, 1873. Writ dated November 15, 1875. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, upon an auditor's report, which was to be taken as an agreed statement of facts, and so much of which as is necessary to the understanding of the point decided appears in the opinion.

J. B. Bottum, for the plaintiff.

J. C. Hammond, for the defendant.

COLT, J. The auditor's report is taken as an agreed statement of facts. He finds that the intoxicating liquors for which the plaintiff seeks to recover, to use the auditor's own words, "were sold in the State of Connecticut for the purpose of being brought into this Commonwealth to be here kept and sold in violation of law." If this sentence, and the finding of the auditor that the plaintiff was not entitled to recover, had ended here, it might fairly be inferred that both parties to the sale participated in the illegal purpose; but he goes on and adds, "that the defendant entertained such illegal purpose, and that the plaintiff had reasonable cause to believe that the defendant entertained such illegal purpose." This addition qualifies and limits the first statement, and must have been added with that intent only; for any other object it was wholly unnecessary. It shows the extent to which the auditor found that the plaintiff, as one of the parties to the sale, was affected by the defendant's illegal purpose. Taking the whole sentence together, it is plain that the auditor did not intend to find that the plaintiff made these sales for the purpose of promoting an illegal traffic in this state, or that he ever had knowledge of the defendant's purpose.

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A case is therefore presented, where a sale was made in another state, by a seller who had reasonable cause to believe, but no knowledge of, the illegal purpose, and no intention to promote it.

When the liquors in question were sold, the St. of 1869, *c.* 415, was in force. By § 63, it was provided that no action should be maintained for the price of liquor sold in another state, for the purpose of being here kept or sold in violation of law; provided the seller had reasonable cause to believe that the purchaser entertained such purpose. The statute in question affects the remedy only. It does not attempt to invalidate sales legally made out of this state, or impose penalties and forfeitures on the parties to such sales.

Before this action was commenced, the St. of 1869 was repealed by the St. of 1875, *c.* 99, § 22, saving only pending prosecutions, and penalties and forfeitures already incurred. The rights of these parties must therefore be determined by common law rules, and those rules require at least knowledge of, as distinguished from mere reasonable cause to believe in, the illegal purpose of the buyer.

The findings of the auditor fail to bring home to the plaintiff anything more than reasonable cause to believe, and this, it is well settled, is not enough to defeat his right to recover. *Adams* v. *Coulliard*, 102 Mass. 167. *Ely* v. *Webster*, 102 Mass. 304. *Hotchkiss* v. *Finan*, 105 Mass. 86. See also *Hill* v. *Spear*, 50 N. H. 253. *Judgment for the plaintiff.*

LYCURGUS V. B. COOK *vs.* JOHN A. THAYER & another.

Hampshire. Sept. 17. — Nov. 27, 1877. ENDICOTT & LORD, JJ., absent.

A poor debtor duly presented himself for examination at the time and place appointed by a recognizance entered into under the Gen. Sts. *c.* 124, § 17. Before the expiration of the hour the creditor came to examine him, and the question arising whether it was not too late, the oath having been administered, the debtor, at the suggestion of the magistrate, left the place to see his counsel, and shortly returned. *Held*, that the debtor must make known to the magistrate that he had returned for examination, unless the creditor knew it or waived the right; and, that, the debtor having been permitted to show that he returned in consequence of his counsel's advice, evidence of what the advice was was inadmissible.

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CONTRACT on a recognizance entered into under the Gen. Sts. c. 124, § 17, by the first named defendant, as principal, and the other, as surety, and conditioned that John A. Thayer, who had been arrested on an execution in favor of the plaintiff, should appear on December 11, 1875, at ten o'clock, A. M., at the office of A. Perry Peck, a trial justice for said county, in Northampton, being the time and place fixed by the magistrate taking the recognizance, at the debtor's request, for his examination as poor debtor, and from time to time until the examination was concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon.

After the former decision, reported 121 Mass. 415, the case was tried in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

There was evidence tending to show that the debtor was at the office of the magistrate named in the notice, at the time specified, and remained there till about twenty minutes to eleven o'clock, A. M., when it was suggested that the creditor did not intend to appear, and the poor debtor's oath was administered; that the creditor had not appeared, but came in before eleven o'clock, and before the debtor left, for the purpose of examining the debtor. It was undisputed, that, as the plaintiff's counsel and the plaintiff were going to the magistrate's office, the defendant's counsel met them and said they were too late, that the oath had been administered, to which the plaintiff's counsel replied he thought not, that he was entitled to a full hour; that the plaintiff's counsel, upon reaching the magistrate's office, where the debtor was present, stated that he desired to examine the debtor, and was told by the magistrate that the oath had been administered; that a question was made whether it was not too late, the oath having been administered, and whether the creditor had any right to examine the debtor; and that the debtor, at the suggestion of the magistrate, left the office to see his counsel, the creditor and his counsel remaining at the office of the magistrate about fifteen minutes longer, and until about eleven o'clock. There was also evidence tending to show that the debtor, on the suggestion of the magistrate, went at once to the office of his counsel, and immediately returned to the office

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of the magistrate, and arrived there about eleven o'clock, — the evidence as to whether before or after eleven o'clock being conflicting, — and there remained about half an hour longer, for the purpose of fulfilling his recognizance and being examined; that the debtor, as he was returning to the magistrate's office, met the creditor and his counsel leaving the magistrate's office, on or near the stairway; that the plaintiff's counsel, after leaving the magistrate's office, went immediately to the office of the counsel of the debtor, and, while the debtor was at the magistrate's office, it was the subject of talk between the counsel of the plaintiff and the debtor's counsel, at the office of the latter, whether the debtor arrived at the magistrate's office, upon his return, before or after eleven o'clock, — the debtor's counsel claiming that he arrived before, and the creditor's counsel claiming that he did not, and that at the expiration of the hour he had the debtor defaulted, before he came back; that there had been a breach of the recognizance, and that he should bring an action on it, unless a secured note was given or the creditor's claim paid. This was contradicted by the plaintiff.

The defendants offered the testimony of the debtor and of one of his counsel, who was acting for him at that time, to show what advice the debtor received from his counsel at his office, and that it was to return immediately to the magistrate's office and be ready to be examined; and that, in pursuance of that advice, the debtor returned to the magistrate's office. The judge excluded the evidence, but permitted the defendants to prove that the debtor returned to the magistrate's office in consequence of the advice given.

The evidence was conflicting on the point whether the debtor, after his return, informed the magistrate, in any manner, that he was ready to be examined. There was also evidence tending to show that the creditor's counsel, before leaving the magistrate's office, asked the magistrate to inform him if the debtor desired an examination, which request, if made, was not communicated to the debtor or his counsel. The plaintiff contended that there was a breach of the recognizance, unless the debtor, upon his return to the magistrate's office from the office of his counsel, was ready and offered to be examined. Neither the plaintiff nor his counsel returned to the magistrate's office after leaving it

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as above stated, nor was either present after the debtor's return, nor did the plaintiff's counsel, when in the office of the debtor's counsel, express any wish to examine the debtor.

The judge instructed the jury that the debtor must, by word or act, have made known to the magistrate that he had returned for the purpose of being examined, or that there would be a breach, unless the plaintiff or his counsel knew the debtor had returned for the purpose of examination, and waived the examination.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

W. G. Bassett, for the defendants. 1. The ruling given was erroneous, as it practically compelled the debtor to prove that he made a formal announcement to the magistrate that he had returned for examination. His presence before the magistrate, within the time allowed, ready and willing to be examined, was sufficient, and the issue should have been so limited. *Cook* v. *Thayer*, 121 Mass. 415. The creditor having failed to attend, no further duty was imposed on the debtor than that which he performed. Gen. Sts. *c.* 124, § 48. *Phelps* v. *Davis*, 6 Allen, 287. *Russell* v. *Goodrich*, 8 Allen, 150. *Goodall* v. *Myrick*, 111 Mass. 484.

2. The advice received by the debtor from his counsel should have been admitted as part of the *res gestæ*. It was the statement of an agent of the debtor, relative to the performance of the contract in question, and contemporaneous with the other proceedings, and characterized the immediate conduct of the debtor. *Lund* v. *Tyngsborough*, 9 Cush. 36, 43. 1 Greenl. Ev. § 118.

G. M. Stearns, for the plaintiff.

AMES, J. It appears that while the debtor and creditor were in the presence of the magistrate, and before the expiration of the appointed hour, a question arose whether the debtor, having already taken the oath before the creditor appeared, was thereafter bound to submit to examination. Instead of submitting to be examined, the debtor obtained leave from the magistrate to see his counsel, for the purpose of being instructed as to his rights and duties in the matter. We have decided that the effect of this permission was to extend the hour for a reasonable length

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of time, for that purpose, and that if the debtor returned, for the purpose of submitting to the examination, within such reasonable time, even though the original hour had expired, it would not of itself be a breach of the recognizance. *Cook* v. *Thayer*, 121 Mass. 415.

But it is to be remembered that submission to examination, if the creditor wishes to examine, is indispensable to the debtor's discharge. *Millett* v. *Lemon*, 113 Mass. 355. *Simpson* v. *Trivett*, 120 Mass. 147. He had left the magistrate's office, refusing to be examined, or at least leaving it wholly uncertain whether he would be examined or not. His return to the office was not necessarily a submission to examination. We cannot know that he did not return, with the intention of relying upon the oath which he had already taken, in case the creditor should be absent. The failure of the creditor to be in attendance was not conclusive proof of an abandonment of his right to examine, inasmuch as there was evidence tending to show that he had made arrangements to be informed if the debtor should conclude to undergo examination, and there was no evidence that he had been so informed. Under such circumstances, the case is distinguishable from *Phelps* v. *Davis*, 6 Allen, 287; and it was clearly the duty of the debtor to make his conclusion known. Until he did so, all that the magistrate could know was that the debtor had once refused, and had not made known a change of mind. Under the instructions given, the jury must have found that the debtor did not make known to the magistrate, by word or act, that he had returned for the purpose of being examined, and that neither the plaintiff nor his counsel knew that he had so returned, or waived the examination. There was nothing in this instruction open to exception. On the contrary, it was carefully guarded, and fully covered the rights of the defendants. Nor do we find any error in the ruling excluding evidence of the advice given to the debtor by his counsel. It was enough that he was permitted to show that it was in consequence of that advice that he returned. *Exceptions overruled.*

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ELIZA MERRITT & others *vs.* ALFRED L. CONVERSE, trustee, & another.

Hampden. Sept. 26. — Nov. 24, 1877. ENDICOTT & LORD, JJ., absent.

A testator, by his will, after giving certain legacies and an annuity to his son W. during his life, to be paid out of the income of the estate, directed that "after the decease of W., provided he shall live until his youngest child shall have attained the age of twenty-one years," the residue of the estate should be divided into two parts, and one of these parts should be distributed among the children of W.; that if W. should die before his youngest child had attained the age of twenty-one years, such division should not be made before his youngest child had reached that age or would have reached it if living; that "during the time intervening between the death of W. and the time when his youngest child arrives at the age of twenty-one years," his children or their heirs should receive *pro rata* the annuity which their father would have received if living; that a similar distribution of the remaining half of the residue should be made among the children of W. when the youngest had attained the age of thirty years, with a provision that if the children should have made bad use of the money previously paid over to them under the will, the estate, or so much of it as might be necessary for their benefit and support, should be kept in trust for them; and that in case W. should be living at the time his youngest child should have attained the age of thirty years or would have attained that age if living, the distribution of the latter half of the residue should not be made until after the death of W., but should be kept for the purpose of paying his annuity out of the income of it, and, if necessary, out of the principal. *Held*, that no part of the residue was to be distributed until after the death of W.

BILL IN EQUITY by the residuary legatees under the will of James Dimmick, against Albert A. Converse and William K. Dimmick.

The will of the testator, after giving certain legacies and annuities, contained the following clauses:

"Sixth. I give and devise to my son, William K. Dimmick, the sum of three hundred dollars annually, to be paid to him out of the income of my estate during the term of his natural life, by my executors, in semiannual payments of one hundred and fifty dollars each."

"Eighth. After the decease of my said son William K. Dimmick, provided he shall live until his youngest child shall have attained the age of twenty-one years, I then order and direct that the balance of my estate be divided into two equal parts, one of which parts shall be equally distributed among the children of my said son William K. Dimmick, share and share alike,

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and if any of his children shall be dead leaving issue, such issue shall take the share belonging to their parent, *pro rata;* but if my said son William K. Dimmick shall die before his youngest child attains the age of twenty-one years, then such division of my estate shall not take place until said youngest child attain said age of twenty-one years, or would have attained that age if living; and during the time intervening between the death of my said son William K. and the time when his youngest child arrives at said twenty-one years of age, his children or their heirs shall receive, *pro rata*, said sum of three hundred dollars, share and share alike, which their father would have received if living.

"Ninth. The other equal part of the balance of my estate as mentioned, and not provided for in the last preceding article, shall be kept in the hands of my executors, or their successors, until the youngest child of my said son William K. shall have attained the age of thirty years; when the same shall be divided among his children or their heirs as provided in said article; unless they shall have squandered and made bad use of the money previously paid over to them under this, my will, and bid fair to be town paupers — in which case (and the decision concerning which I leave to my executors and the overseers of the poor, under an order or decision of the judge of probate,) I order and direct the same, or so much thereof as may be necessary, to be kept by my executors, their successors, or some one appointed by the judge of probate, for their benefit and support, so that they may not become a charge and expense to others, — and if anything shall be left of my estate after their death, and the death of all of them, the same shall be paid over to my legal heirs then living, in the sums and proportions to which they may be by law entitled."

"Eleventh. I order and direct, in case my said son William K. Dimmick shall be living at the time his youngest child shall have attained the age of thirty years, or would have attained that age if living, that then, and in that case, the disposition of that part of the residue of my estate mentioned in article ninth herein shall not be made until his decease, and that the same be kept by my executors, or their successors, for the purpose of paying said William K. the annual sum of three hundred dol-

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lars out of the income thereof as hereinbefore provided · or if the income from such residue shall not be sufficient for that purpose, then the balance or deficiency to be paid him out of the principal remaining in their hands, it being my will and intention that he shall have annually the sum of three hundred dollars so long as he may live, be his life, under the providence of God, long or short."

The bill alleged that the youngest child of William K. Dimmick had attained the age of twenty-one years; that the intention of the testator was that the eighth clause of the will should read, "After the decease of my said son William K. Dimmick, *or* provided he shall live," &c. That the executors of the will had both deceased, and the residue of the estate, amounting to $40,000, was in the hands of the first named defendant, who had been appointed a trustee by the Probate Court; that the plaintiffs had requested the trustee to divide the residue into two parts, and to distribute one of them as provided by the will, but the trustee had refused so to do.

The prayer of the bill was that the trustee might be ordered to make the distribution accordingly.

The bill was taken for confessed against William K. Dimmick. The trustee filed an answer, in which he admitted the allegations of the bill except as to the intentions of the testator, and averred his willingness to act as the court should direct.

Hearing upon the bill and answer, before *Colt*, J., who reserved the case for the consideration of the full court.

A. M. Copeland, for the plaintiffs.

J. P. Buckland, for the trustee, submitted the case without argument.

COLT, J. By the will of James Dimmick, after certain other legacies and annuities are given, an annuity is provided for his son William for and during his natural life, to be paid out of the income of the estate. Following this provision, the eighth clause requires in substance a division of one half the residue, to be made among the children of William after the death of the latter, but not before his youngest child shall have attained the age of twenty-one years.

This clause, standing alone, although not concise or wholly accurate in all its language, is nevertheless clear and unambiguous

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as to the time when the contemplated distribution of the one half in question should be made. It is to be in any event not until after the death of William, and not then unless the youngest child has reached the age named.

It is argued that the language of the clause in question is controlled by subsequent provisions, showing an intention that this half of the estate should be divided at all events, when all the children had become of age. The provisions referred to require a similar distribution of the remaining half among the children, when the youngest attains the age of thirty years, with an additional clause providing that if the children shall have made bad use of the money previously paid over to them under the will, then the estate, or so much of it as may be necessary for their benefit and support, shall be kept in trust for them. The distribution of this half of the residue, it is also declared, shall not be made until after the death of William, but shall be kept for the purpose of paying the annuity to William out of the income, and if necessary out of the principal.

It is to be inferred that the testator anticipated two different distributions of the residue. In the expectation that William, in the ordinary course of events, would not live until his youngest child should be thirty years of age, he naturally supposed there would be a period of greater or less duration before the distribution of the last half, in which the capacity and disposition of the children to take care of the property given them in the first distribution would become manifest. There is nothing to indicate that this period of probation must necessarily extend over the whole time required for the youngest to reach the age of thirty. That depends on the life of William, and the plan of the testator in this regard may yet be substantially carried out. It may be that by the unexpected duration of his life, the estate may all come to be divided at one and the same time, and the plan for probation, and for leaving the whole or part of the last half for the protection of devisees who may turn out improvident, may be thereby defeated.

But these considerations are not enough to defeat an express and positive provision, by which no part of the estate is to be divided while the son lives. The fact that the testator did not foresee all the consequences of his disposition of the estate is no

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reason for disregarding an unambiguous provision, or for supplying, substituting or rejecting words by intendment, so as to change its meaning. There is no absolute repugnance in the provisions of this will to justify such a construction. *Butterfield* v. *Hamant*, 105 Mass. 338. *Carpenter* v. *Heard*, 14 Pick. 449. *Hunt* v. *Hunt*, 11 Met. 88. *Bill dismissed.*

GEORGE W. EAMES *vs.* LUTHER WHITTAKER.

Worcester. Oct. 3. — Nov. 3, 1877. ENDICOTT & LORD, JJ., absent.

A communication, otherwise slanderous, is protected as privileged, if made in good faith in the prosecution of an inquiry regarding a crime that has been committed, and for the purpose of detecting and punishing the criminal.

If a question is put to a witness on cross-examination, which is collateral or immaterial to the issue, his answer cannot be contradicted.

It is within the discretion of a judge to exclude evidence offered by a plaintiff in rebuttal, which would have been competent as a part of his case in chief.

TORT for slander. The declaration alleged that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of larceny, by words spoken of the plaintiff substantially as follows: "He broke into my house and robbed it." "He entered my house and robbed it." "He entered my house and stole my money and my son's money." "My son Herbert saw him in the house and saw him rob it, and will testify to it." Answer: 1. A general denial. 2. That the accusations, if made, were true. 3. That, if the words alleged to have been spoken should be proved, they were privileged communications, made in the course of a prosecution against the plaintiff for larceny. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff rested his case on the declarations of the defendant to himself in the presence of third persons and to three witnesses, Morrill, Brigham and Cutting, the latter two being constables to whom the defendant applied to make an arrest under a warrant issued by a magistrate, on his complaint. It appeared that the defendant, the day after his house was robbed, called upon Morrill, a neighbor, and informed him of the robbery, and,

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in answer to the inquiry, "Do you suspect any one?" replied, "Yes, I have good reason to believe that George W. Eames did, and I think he is the one." The defendant testified that he called upon Morrill to see if he could make any suggestions that would lead to the detection of the thief; and that he advised with him and learned that Morrill had let to the plaintiff a horse and wagon for that evening, and arranged to have the plaintiff arrested when he was about to have the horse and wagon. The plaintiff contended and asked the judge to rule that, under the circumstances, the communication to Morrill was not a privileged one. The judge refused so to rule, and instructed the jury that if the defendant called upon Morrill for the purpose of taking such action as would lead to the detection of the robber of his house, and made the communication to him in good faith and without malice, then the communication was a privileged one.

The defendant called his son Herbert as a witness, and, on his cross-examination by the plaintiff, he was asked whether he had not told, at a time specified, one Mulchay that his father had accused his mother, the wife of the defendant, of being the thief who had stolen his money, and had choked her to make her tell what she had done with the money; and whether he had not told Mulchay, in the same conversation, that his father had tried to get him to go into court and testify that he saw the plaintiff in the house of the defendant on the night of the robbery. The defendant's son answered both questions in the negative, and denied that his father had ever tried to get him to testify or had ever accused and choked his mother. The plaintiff, for the purpose of contradicting and impeaching the son, called Mulchay as a witness, and asked him whether Herbert had told him, in the conversation referred to, what the plaintiff had asked Herbert on his cross-examination. The judge excluded the evidence.

The defendant was asked, on his cross-examination, whether he had not told one Rice that he had no doubt but that the plaintiff was the one who had entered his house and robbed it. He answered the question in the negative. The plaintiff called Rice as a witness, and asked him whether the defendant had told him that he had no doubt but that the plaintiff was the one

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who had entered his house and robbed it. The defendant objected to the question, and the judge asked for what purpose the evidence was offered. The plaintiff said he offered it for the purpose of showing that the defendant had accused the plaintiff as alleged in his declaration, as showing malice on his part by a repetition of the slander, and as contradicting and impeaching the defendant's testimony. The judge ruled that it was a part of the plaintiff's case and should have been introduced in chief. The plaintiff then appealed to the judge, in the exercise of his discretion, to allow the evidence to be introduced at this stage of the trial as newly discovered evidence, but the judge refused to grant his request. The plaintiff then offered the evidence for the sole purpose of contradicting and impeaching the defendant's testimony; but the judge excluded the evidence.

The jury returned a verdict for the plaintiff for $1; and the plaintiff alleged exceptions.

B. W. Potter, for the plaintiff.

W. S. B. Hopkins & H. F. Harris, for the defendant.

MORTON, J. 1. Upon grounds of public policy, communications which would otherwise be slanderous are protected as privileged, if they are made in good faith in the prosecution of an inquiry regarding a crime which has been committed and for the purpose of detecting and bringing to punishment the criminal. The instructions in this case at the trial were substantially in accordance with this rule and were correct.

2. It is not shown that there was any error in the rejection of the testimony of the witness Mulchay. The declarations made by the son of the defendant were not admissible as proof of the facts he stated. They were immaterial and incompetent, unless they tended to contradict him upon some part of his testimony material to the issue. *Foot* v. *Hunkins*, 98 Mass. 523. The bill of exceptions does not show what the testimony of the son was, and therefore does not show that the offered testimony of Mulchay had any such tendency. The fact that the defendant's son, on his cross-examination, had denied that he made these declarations, does not give the plaintiff the right to put them in evidence. The plaintiff, having cross-examined the witness upon an irrelevant and collateral matter, is concluded by his answers, and cannot be allowed to contradict them.

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3. The testimony of Rice, to the effect that the defendant had told him that "he had no doubt that the plaintiff was the one who entered and robbed his house" would have been competent, to show motive, as a part of the plaintiff's case in chief. But it was within the discretion of the court, in the ordering of the course of the trial, to exclude it at the stage at which it was offered. *Strong* v. *Connell*, 115 Mass. 575.

Exceptions overruled.

WALTER HENRY *vs.* ALFRED DAVIS.

Worcester. Oct. 6. — Nov. 16, 1877. ENDICOTT & LORD, JJ., absent.

B. gave a bond in the usual form in a penal sum to A. to abide by the determination of arbitrators of a disputed boundary line, and to execute to A. a quitclaim deed of land lying on one side of the line so determined. B. refused to execute the deed and brought a bill in equity to set aside the award, which was dismissed with costs. *Held*, in an action on the bond, that the penal sum could not be treated as liquidated damages. *Held, also*, that A. could not recover as damages his expenses in defending the suit in equity.

CONTRACT upon a bond "in the sum of $500." The case was submitted to the Superior Court, and, after judgment for the plaintiff for nominal damages, to this court, on appeal, on an agreed statement of facts, the substance of which appears in the opinion.

W. S. B. Hopkins, for the plaintiff.

T. L. Nelson & H. L. Parker, for the defendant.

MORTON, J. The plaintiff and defendant, being the owners of adjoining lots of land, the dividing line of which was in dispute, entered into an agreement to submit to arbitrators the question of the location of the disputed line. At the same time the defendant executed the bond in suit, the condition of which is that he shall stand to and abide by the decision and award of a majority of the arbitrators, and shall stand to and abide by the boundary line agreed upon and established by the said arbitrators as the true boundary line between their respective estates, and shall execute to the plaintiff a quitclaim deed of any interest, right or title to any land lying southwesterly of said boundary line so established, within thirty days after demand

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therefor. The arbitrators made their award establishing the boundary line, and the plaintiff duly demanded of the defendant a quitclaim deed of his interest, right and title in and to the land lying southwesterly of said line. The defendant refused to give such quitclaim deed, and afterwards brought a bill in equity to set aside the award, which bill, after a hearing, was dismissed with costs. *Davis* v. *Henry*, 121 Mass. 150.

It is admitted by the defendant that the facts show a breach by him of the condition of his bond, and the only questions raised are as to the amount of damages the plaintiff is entitled to recover.

He contends that he is entitled to recover the penal sum named in the bond as liquidated damages. We are of opinion that this claim cannot be sustained. The bond is in the usual form, in the penal sum of five hundred dollars. It contains no express agreement that that sum is to be regarded as liquidated damages, and we find nothing in the bond, or in the nature of the case, which would justify the inference of an intention that such sum should be treated as the stipulated and ascertained damages for a breach. There is nothing to take the case out of the general rule that in bonds of this form, the penal sum named in the bond is regarded as a penalty and not as liquidated damages.

The plaintiff further contends that, if the damages are not iquidated, he is entitled to recover as damages the expenses which he incurred in defending the suit in equity brought by the defendant to set aside the award. The plaintiff has been awarded his costs in that suit. The theory of the law is, that the taxable costs awarded to the prevailing party in a suit furnish a full indemnity to him for all his expenses incurred in the suit. Therefore a defendant, who successfully defends a suit brought against him, has no right of action or claim beyond the amount of the taxable costs against the plaintiff therein. It follows that the plaintiff in the case at bar has no claim against the defendant for the expenses he seeks to recover, which he can enforce, either directly by a suit, or indirectly as damages for a breach of his bond. In this view it is not necessary to consider whether, if such a claim existed, it would not be too remote to be allowed as an element of damages for such breach.

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It is hardly necessary to add that this case has no resemblance to the cases of *Pond* v. *Harris*, 113 Mass. 114, and *Westfield* v. *Mayo*, 122 Mass. 100, cited by the plaintiff.

Judgment affirmed.

JAMES PLACE *vs.* R. M. GOULD.

Worcester. Oct. 2. — Nov. 26, 1877. ENDICOTT & LORD, JJ., absent.

In an action for the conversion of goods, attached by the defendant in a shop as the property of the person in possession, and claimed by the plaintiff under a previous sale from that person, there was evidence that the seller conducted the business of the shop, after the sale, in the same manner as before. *Held*, that evidence that the seller, after the sale and before the attachment, told a person that the goods he was then buying belonged to the plaintiff, who had bought him out, was admissible to show that, after the alleged sale, purchases and sales of goods were made by the plaintiff, or in his name.

TORT for conversion of certain goods. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the material parts of which appear in the opinion.

W. S. B. Hopkins, for the defendant.

F. T. Blackmer, for the plaintiff.

COLT, J. Goods in a shop were attached by the defendant as the property of Daniel Place. The plaintiff claimed title to them under a sale from Daniel previously made to him. The defendant introduced evidence tending to show that, after the alleged sale, the business of the shop was conducted in the same manner as before, without notice, or visible change, or claim of change, in the ownership of the property.

For the purpose of showing that, after the alleged sale to the plaintiff, the purchases and sales of goods in the shop were made by the plaintiff or in his name, a witness was permitted to testify that Daniel stated to him that the goods he was then buying were the goods of the plaintiff, and that the plaintiff had bought him out. This statement accompanied a sale of goods made in the shop after the plaintiff's title was acquired, and before the defendant's attachment. It was offered in reply to the defend-

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ant's case for the purpose above stated, and, as we understand the exceptions, must be treated as admitted for that purpose only. The exceptions state that the judge admitted the testimony solely as tending to prove that there was a sale on the fourth of November, and that the business was carried on in the name of the plaintiff, and, as between him and Daniel, the property was treated as the property of the former, and not as bearing on the question whether the sale was fraudulent and void as to creditors. But, in view of the testimony of the witness, the purpose for which it was offered, and the restricted form of its admission, it is plain that it could not have been understood to have been admitted as competent to prove the disputed fact of the previous sale from Daniel to the plaintiff, except so far only as an actual change of possession and control of the property had a tendency to show an honest previous change of title. If the statement had been admitted for the more general purpose, the restriction stated by the judge would have been neither necessary nor proper. The evidence was not admitted as a narrative of a past transaction, the existence and validity of which was in controversy, but rather as a declaration in the nature of a verbal act accompanying a delivery of goods, and showing that, although they were delivered by the hand of the former owner, in the ordinary course of business, they were in fact sold by him as the property of the plaintiff. The fact that the seller remains in possession is evidence of fraud which may always be rebutted by showing that such possession was at the time declared to be the possession of the true owner by his servant or agent. The evidence here admitted was material and significant as explanatory of the apparent possession, and tended to defeat the inference, from the defendant's evidence, that there had been no change or claim of change in regard to it. The fact that the declaration was made, and not its truth or falsity, was the point relied on.

There is no want of harmony with this result in the decisions of this court. In *Boyden* v. *Moore*, 11 Pick. 362, which was an action like this, against an attaching officer for taking personal property of the plaintiff as the property of another, the declarations of the plaintiff as to the custody of the property were admitted to control the inference of fraud arising from the fact

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that the property, after the alleged sale to the plaintiff, remained in the custody of his son, the vendor. Shaw, C. J., declared that they were rightly admitted, not as proof of the facts alleged, but as part of the *res gestæ*, and tending to show that the possession and acts of the son were those of an agent. In the decisions of many other states, this distinction is clearly recognized. *Blake* v. *White*, 13 N. H. 267. *Pomeroy* v. *Bailey*, 43 N. H. 118. *Walcott* v. *Keith*, 2 Foster, 196. *Jacobs* v. *Remsen*, 36 N. Y. 668. *Avery* v. *Clemons*, 18 Conn. 306. *Redfield* v. *Buck*, 35 Conn. 328. *Helfrich* v. *Stem*, 17 Penn. St. 143.

The cases cited by the defendant from our own reports stand upon the well established rule, that neither the subsequent declarations nor the subsequent acts of a grantor, or of one who has sold goods to another, are competent evidence to defeat or impair the purchaser's title on the ground that the sale was in fraud of creditors, and do not control the admission of such evidence, when produced only to show the character of the subsequent possession. *Horrigan* v. *Wright*, 4 Allen, 514. *Gates* v. *Mowry*, 15 Gray, 564. *Aldrich* v. *Earle*, 13 Gray, 578.

Exceptions overruled.

JOHN G. AVERY *vs.* GEORGE H. BUSHNELL & another.

Worcester. Oct. 3. — Nov. 26, 1877. ENDICOTT & LORD, JJ., absent.

A. sold and delivered to B. certain machinery for the manufacture of a patent machine, the license to manufacture which was to expire at a certain date, and took in payment a note, secured by a mortgage back upon the machinery and referring to an agreement of even date between the parties, by which A. was to retain in payment of the note a part of the price of such machines as B. should make for him. When the license expired a balance was due upon the note, which B. failed to pay on demand. *Held*, that A. was entitled to foreclose the mortgage for the payment of the debt secured thereby.

REPLEVIN of certain machinery. Writ dated December 28, 1876. At the trial in this court, before *Morton*, J., without a jury, it appeared that the plaintiff and one Kent, deceased, owned the machinery in question, which was used in the manufacture of a certain patented machine, their license to manufacture

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which was to expire on July 26, 1875; and that on October 2, 1871, the plaintiff and Kent sold and delivered the machinery to William F. Bancroft and George H. Bushnell, and received in payment the following note, signed by them, secured by a mortgage back upon the machinery:

"$3700. Worcester, October 2, 1871. For value received, we William F. Bancroft and George H. Bushnell promise to pay to the order of John G. Avery and Ira R. Kent the sum of thirty-seven hundred dollars and interest thereon to be computed semiannually at the rate of seven per cent. per annum, said sum and interest to be paid according to the stipulations contained in a certain contract between the promisors and promisees of even date herewith, which contract is hereby referred to and made a part of this note; said Bancroft and Bushnell reserve the right to anticipate the payment of any part or the whole of this note at any time. Payment of this note is secured by mortgage of personal property duly stamped."

The mortgage, so far as material, provided that upon the payment of $3700, "according to the stipulation and condition of a certain note and a certain contract mentioned and referred to in said" note, "then this deed, as also said certain note of even date herewith, signed by the said William F. Bancroft and George H. Bushnell, whereby they promise to pay to the grantees, or order, the said sum and interest at the times aforesaid, shall be void."

The contract referred to, signed by the parties to the note and mortgage, was as follows:

"Contract made this second day of October, A. D. 1871, between John G. Avery and Ira R. Kent, both of Spencer, in the County of Worcester, of the first part, and William F. Bancroft and George H. Bushnell, both of Worcester, in said county, of the second part, witnesseth, that the said John G. Avery and Ira R. Kent are the owners of certain machinery, tools and fixtures situate in the shop of J. S. Wheeler and Company, No. 25 Hermon Street in said Worcester, and upon the basement floor therein, which are specifically enumerated in the schedule hereto annexed marked 'A,' of the value of thirty-seven hundred dollars.

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"Said Avery and Kent have an exclusive license to manufacture the 'Kent and Bancroft Self Operator,' (a machine patented under the laws of the United States,) for the term of five years from July 26th, A. D. 1870.

"The machinery and fixtures enumerated in said schedule are hereby sold and delivered to said William F. Bancroft and George H. Bushnell at said value, with permission to remove the same to the shop of the Water Meter Company, No. 31 on said Hermon Street, and said Bancroft and Bushnell are to pay for the same in the manner hereinafter provided; and in consideration hereof it is agreed that said Bancroft and Bushnell shall build all the machines that shall be made for said party of the first part, or for any other person under said letters patent, until July 25th, A. D. 1875, provided they will or can fill all orders given by the parties of the first part within sixty days from the date of receiving the order, or until the indebtedness of the party of the second part to the party of the first part is cancelled, said machines are to be completed in good and workmanlike manner, boxed for shipping, and delivered at depot within a reasonable time after receiving the order. Price to be two hundred dollars for each machine as now built, provided they do not exceed twelve sections; for any change required which does not increase or diminish the cost to a greater amount than three dollars, no claim shall be made by either party; extra track and wheels eight dollars each. Bancroft and Bushnell are to furnish new iron patterns when the present wooden patterns may be worn out, without expense to the party of the first part, except for the scrolls. Ninety-five per cent. of the amount earned in building said machines shall be due and payable from the party of the first part to the party of the second part when the same are ready for delivery, the balance is to be retained by the party of the first part for the purpose of liquidating the indebtedness of the party of the second part and the interest thereon, which shall be computed at the rate of seven per cent. per annum. Payment of said indebtedness as aforesaid to be secured by mortgage of the property herein sold to second party; the second party shall have the right to anticipate the payment of said indebtedness at any time."

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It also appeared that the defendants, whose assignee in bankruptcy alone defended, were the assignees of the mortgage and were in possession of the machinery, claiming to own the same, until it was replevied; that the defendants and their assignors were always ready and able to manufacture such patented machines as Avery and Kent might order until the license expired on July 26, 1875; that on July 26, 1875, payments in the form of five per cent. of the price of the patented machines made by the defendants or their assignors had amounted to only enough to reduce the $3700 to about $2800; that no further payments upon the debt secured by the mortgage were ever made; that the failure of Avery and Kent to furnish orders for the patented machines seriously injured the defendants; that on July 27, 1875, Avery and Kent made a demand in writing upon the defendants for the balance due upon the mortgage, and, the demand not having been complied with, on August 14, 1875, served upon them a notice to foreclose the mortgage.

The plaintiff contended that the refusal of the demand for payment of the balance of the note in money on July 27, 1875, was a breach of the condition of the mortgage which entitled him to possession of the machinery and to maintain this action.

The judge found for the plaintiff, and reported the case, at the request of both parties, for the consideration of the full court.

G. F. Hoar & T. L. Nelson, for the defendants.

W. S. B. Hopkins, for the plaintiff.

COLT, J. The mortgage of personal property under which the plaintiff claims title, with the note secured thereby, and the contract therein referred to, between the parties to the mortgage, were executed at the same time and are to be construed together as constituting one transaction. So construed, we have no question that they created a debt to the plaintiff, secured by the mortgage, for the payment of which he is entitled to the possession of the property therein described.

It appears that there was a sale of machinery for a price agreed, and a delivery of the same to the purchasers, who gave an agreement for the payment of the price, in the form of a note secured by a mortgage back on the same property. The note refers to the contract, which is also made part of it. But the contract is

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simply an agreement as to the method in which the debt may be paid other than in cash, namely, by certain allowances to the promisors for work which might be done for the promisees upon orders furnished by them for the manufacture of certain patented machines. But there is no agreement that the latter shall furnish orders for machines, the demand for which must have been limited at least, and would entirely fail with the life of the patent. There was a possibility that those allowances would not be sufficient to pay the debt. And the right to anticipate payment in cash was expressly reserved. It is clear that the mortgagors, when they made the arrangement, took the risk of not being able to pay the whole, in the method which the mortgagees agreed to accept, and, failing in that, the balance, in the absence of anything in the agreement fixing the time, becomes due, if not on demand, at least after lapse of a reasonable time.

Judgment for the plaintiff.

LUTHER W. GILES *vs.* THOMAS ASH & trustee.

Bristol. Oct. 24. — Nov. 1, 1877. LORD & SOULE, JJ., absent.

An assignment, under seal and duly recorded, of wages by A. to "J. B., treasurer," to secure the corporation, of which J. B. was treasurer, for goods it had previously sold and might afterwards sell to A., is valid.

If, in a trustee process, the trustee admits funds in his hands, due as wages to the principal defendant, and an adverse claimant proves a valid assignment of the wages as security for a debt, the trustee is chargeable on his answer for the excess in his hands over the amount of the debt due the claimant.

TRUSTEE PROCESS. Writ dated September 11, 1876. The defendant was defaulted. The Wamsutta Mills, summoned as trustee, admitted that, at the time of service upon it, there was in its hands the sum of $38.61, due the defendant. James Boardman appeared as claimant of the funds in the hands of the trustee, by virtue of an assignment, under seal, dated July 5, 1876, signed by the defendant, and duly recorded, to "James Boardman, treasurer," of the wages due and to be due to the defendant from the trustee until August 1, 1877.

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At the trial in the Superior Court, before *Aldrich*, J., Boardman testified that he was the treasurer of the Industrial Coöperative Association, a corporation in New Bedford; that Ash commenced to trade with the association on April 15, 1876, and continued so to trade until August 15, 1876; that on July 5, 1876, there was due from Ash to the association for goods the sum of $34.97; that Ash then made the assignment of his wages to secure the payment for these goods; that subsequently Ash continued to receive goods from the association to the additional amount of $52.13; that on July 15, 1876, Ash paid $25 on account of the goods, for which the assignment was given as security, and afterwards, on August 14, 1876, he received from the trustee the sum of $27.13 on the account, leaving a balance of $34.97 owing to the association for the goods; and that Ash owed him nothing in his individual capacity, nor anything to which the assignment applied other than the sum for the goods furnished by the association of which he was the treasurer.

The plaintiff objected that the claimant was not entitled to hold the funds in the hands of the trustee, because the assignment ran to "James Boardman, treasurer," and not to the Industrial Coöperative Association, by which the goods were furnished. There was no evidence that the plaintiff had any actual notice of the assignment, or any knowledge of the payments.

The claimant contended that the assignment, being given as security for the goods furnished, applied to the same, though in the name of James Boardman, treasurer. The judge ruled, upon the foregoing facts, that the trustee was chargeable on its answer, and that the claimant could not prevail as against the plaintiff. The claimant alleged exceptions.

L. Lapham, for the claimant.

L. J. Drake, for the plaintiff.

MORTON, J. The bill of exceptions shows that the wages of the principal defendant, which the plaintiff seeks to hold by the trustee process, were assigned, by an instrument under seal, to James Boardman, treasurer. The sole object of the assignment was to secure the corporation of which Boardman was treasurer for goods which it had previously sold, and which it might afterwards sell, to the defendant. Boardman acted in the transaction solely on behalf of the corporation. His assent was the assent

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of the corporation, if such assent was necessary to give the assignment validity as against attaching creditors of the defendant. Besides, such assent is conclusively shown by the fact that the corporation afterwards sold goods to the defendant upon the security of the assignment. The assignment was duly recorded as required by the St. of 1865, *c.* 43, § 2. Upon these facts, we see no ground upon which it can be held that it was invalid.

Under the statute above cited, the plaintiff in the trustee process could show that the assignment, though absolute in form, was held only as security for a debt, and could hold the excess in the hands of the trustee, above the amount found due on the debt at the time of the service of the process. The ruling that the claimant could not prevail as against the plaintiff was erroneous. *Exceptions sustained.*

INHABITANTS OF FREETOWN & another *vs.* HENRY H. FISH & another.

Bristol. Oct. 25. — Nov. 3, 1877. LORD & SOULE, JJ., absent.

A bill in equity cannot be maintained against the trustees of personal property, placed in their hands as an accumulating fund for the future benefit of the heirs of a testator, for a tax assessed under the Gen. Sts. *c.* 11, § 12, *cl.* 6, to such heirs, although the heirs are not pecuniarily responsible.

BILL IN EQUITY, filed July 6, 1876, by the inhabitants of the town of Freetown and the tax collector of that town, against the trustees under the will of Job Terry, late of Freetown, deceased, containing the following allegations:

That Job Terry died in 1861, leaving a will which contained the following bequest: "I give, bequeath and devise all my bank and railway stock, wheresoever being, unto Henry H. Fish and Leander Borden of Fall River, in said county of Bristol, to have and to hold the said stocks upon the trusts and for the purposes and intents hereinafter mentioned; that is to say, that they, the said trustees, will take into their possession said stocks, with power to sell and convey the same, or any part thereof, and the moneys accruing therefrom; and the dividends, interests and profits thereof, from time to time at their discretion will invest

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in safe and profitable money stocks, or in mortgages on good real estate; and in further trust that the said trustees will from time to time pay unto my grandchildren so much of the net yearly income of said trust fund, and the dividends, interests and profits thereof, as they in their discretion shall deem necessary, suitable and proper for their good education and support, not to exceed in any one year the sum of one thousand dollars; and in further trust that the said trustees shall at the expiration of twenty years from the day of my decease pay over to my heirs at law all the said trust fund, with the dividends, interests and profits thereof, to be divided between them according to law."

That the grandchildren and heirs at law of said Terry, alluded to in said will, namely, David Terry and Abbie Evans, have for many years resided and still reside in said Freetown; and that said trustees have in their hands a large amount of personal property in trust, under said bequest, which is properly taxable in Freetown to the heirs at law, as an accumulating fund under the Gen. Sts. *c.* 11, § 12, *cl.* 6; and the taxes thereon have for many years been duly paid by the trustees to the town of Freetown.

That in the year 1875 said property was duly assessed in Freetown to said heirs, with a state, county and town tax, to the amount of $256.50; that a warrant for the collection of the same was duly committed to the tax collector on August 27, 1875, and was duly demanded of said trustees on or about October 1, 1875, but said trustees refused to pay the same.

That said property is not liable to distress for the collection of said tax, that no action at law will lie against said trustees for the same, and that said heirs at law are not legally or pecuniarily responsible for the same, and that the plaintiffs have no plain, adequate and complete remedy at law for the collection of said tax; and that this matter relates to the enforcement and regulation of the execution of a trust relating to personal estate.

The prayer of the bill was that the defendants might be ordered to pay the tax.

The defendants demurred to the bill, assigning as cause of demurrer that they were not liable to pay the tax. The demurrer was sustained; and the plaintiffs appealed.

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E. H. Bennett, (*H. J. Fuller* with him,) for the plaintiffs, was first called upon. The property in the hands of the trustees was rightly taxed as an "accumulating fund," under the Gen. Sts. *c.* 11, § 12, *cl.* 6. *Hathaway* v. *Fish*, 13 Allen, 267. Being rightly taxed in the plaintiff town, where the heirs reside, such town has a right to collect it. The trustees are not liable for it in an action at law, since such action lies only against a "person taxed." Gen. Sts. *c.* 12, § 19. It is the duty of trustees to discharge a lien on property in their hands, such as taxes and assessments. "Where trustees are in possession, and have the management of the estate, they must pay all rates and taxes." 2 Perry on Trusts (2d ed.), § 527. The direction to them to pay the net income to the grandchildren implies they were to pay all current expenses out of the fund. Such duty may properly be enforced by a bill in equity, both on general principles of equity, and under the Gen. Sts. *c.* 113, § 2, being a proceeding for the enforcing and regulating the execution of a trust.

E. Williams, for the defendants, was not called upon.

MORTON, J. In *Hathaway* v. *Fish*, 13 Allen, 267, which was an action of contract brought by the collector of the town of Freetown to recover a tax for the year 1865, assessed upon the trust fund in the hands of the defendants, the court held that the fund was an accumulating fund which, under the Gen. Sts. *c.* 11, § 12, *cl.* 6, was taxable only to the heirs at law at their place of residence and not to the trustees. This is decisive of the case at bar. There has been no change in the circumstances of the parties. Now, as then, the heirs at law reside in Freetown. They alone are taxable upon this fund, and the trustees are not liable to the town in any form of action. The right to assess and collect taxes is created and regulated by statute. The town can collect the taxes in suit of the heirs at law in the modes provided by statute; but there is no provision by which towns, having assessed the taxes upon an accumulating fund to the heirs at law or other persons beneficially interested, can recover them of the trustees. We are therefore of opinion that this bill cannot be maintained. *Bill dismissed.*[*]

[*] See St. 1878, *c.* 189.

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BARNABAS CLARK *vs.* FRANCIS P. GARDNER & another & trustee.

Bristol. Oct. 24. — Nov. 8, 1877. LORD & SOULE, JJ., absent.

In a trustee process, an adverse claimant of the funds in the hands of the trustee is not allowed to show that there were no goods, effects or credits of the defendant in the hands of the trustee, at the time of service upon him.

TRUSTEE PROCESS begun in the Second District Court of Bristol, where judgment was entered against the principal defendants, and George Winslow and Henry H. Elsbree appeared as claimants of the funds in the hands of the trustee, and were adjudged to be entitled to the funds, and the trustee, who had filed no answer, was discharged. The plaintiff appealed to the Superior Court.

At the trial in that court, the claimants were permitted to show that at the time of service upon the trustee there was nothing due from him to the principal defendants. The justice, who heard the case without a jury, found for the claimants, and ordered that the trustee be discharged. The plaintiff alleged exceptions.

J. W. Cummings, for the plaintiff.

N. G. B. Swift, for the claimants.

GRAY, C. J. An adverse claimant is admitted as a party to the suit solely for the purpose of maintaining his right as against the plaintiff to goods, effects or credits in the hands of the supposed trustee, and not for the purpose of trying as against the defendant or the trustee the right to funds to which the plaintiff does not or cannot assert any title. Gen. Sts. *c.* 142, § 15. St. 1865, *c.* 43. *Boylen* v. *Young*, 6 Allen, 582. *Peck* v. *Stratton*, 118 Mass. 406. Evidence that there were no goods, effects or credits of the defendants in the hands of the trustee at the time of the service of the writ upon him would in effect prove the claimant out of court. The decision below admitting such evidence was therefore erroneous, and, as the judgment in favor of the claimant may have been founded upon it, the

Plaintiff's exceptions must be sustained

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SUSAN S. HATHAWAY & others *vs.* JOB T. WILSON.

Bristol. Oct. 25. — Nov. 26, 1877. LORD & SOULE, JJ., absent.

Commissioners appointed to set off dower and make partition among heirs made a return, which was accepted by the court, by which they set off to the widow a lot, on the north side of a tide-water cove, described by metes and bounds running "to the shore," and thence by courses and distances, which there was evidence tending to show corresponded with high-water mark, "to G. B.'s shore," which was in fact a parcel of marsh or meadow, and not part of the estate divided; also three lots of upland; "and also a privilege to have and take off the one third of the seaweed that may wash up on the shore of the lots by the cove and river, which privilege last mentioned is to be divided equally between" the widow and the two sons, "on all the land adjoining the river and cove; all which four lots of land, together with the privileges above described, we have set off to the said" widow for her dower. The commissioners set off to one of the sons a lot on the south side of the cove, bounded "by the cove and river," "excepting two thirds of the shore or seaweed that may wash up on the land or shore;" and did not otherwise dispose of the shore, between high and low-water mark, of the lot set off to the widow *Held*, that her title extended to low-water mark.

GRAY, C. J. This is a writ of entry to recover a parcel of land or flats in Fall River. At the trial, both parties claimed title under James Brightman, who died intestate in 1809, seised of lands lying around a tide-water cove, and of other lands which did not abut on tide water, and leaving four children, Susan S. Hathaway, Hannah Sherman, Perez R. Brightman and George Brightman, and a widow, Betsey Brightman, who afterwards became Betsey Nichols.

In 1820, commissioners appointed by the Probate Court to set off the widow's dower and to make partition of the rest of the estate among the heirs made a return, which was approved by the Probate Court, by which they set off to the widow for life, as her dower, "one lot west of the highway, the north side of the cove, bounded as follows, viz.: Beginning at the north-east corner by the wall and land of Edmund Brightman; thence north seventy-two degrees west fifteen chains to a corner; thence north twenty degrees west three chains and seventy-five links to a corner; thence north seventy degrees west eight chains to the shore; thence south twenty-six degrees west three chains and fifty links; thence south seventy degrees east three chains to George Brightman's shore; thence by said shore south twenty-one degrees east eleven chains and fifty links to a tree; thence

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south fifty-five degrees west to the line of the south side of the cove; thence by said line to the road; thence by said road northerly to the first bounds; containing seventeen acres and sixty rods." They then set off to the widow, by metes and bounds, three other lots of upland, not touching the shore nor in question in this case; "and also a privilege to have and take off the one third of the seaweed that may wash up on the shore of the lots west of the road by the cove and river, which privilege last mentioned is to be divided equally between Betsey Nichols and Perez R. Brightman and George Brightman, on all the land adjoining the river and cove; all which four lots of land, together with the privileges above described, we have set off to the said Betsey Nichols for her dower or thirds in said farm."

The commissioners then set off to Perez R. Brightman, the elder son, "one lot of land situated on the west side of the road and the south side of the cove," bounded "westerly and southerly by the cove and river," and further described by metes and bounds, "excepting two thirds of the shore or seaweed that may wash upon the land or shore;" also a wood lot on the east side of the road, the boundaries of which are not material, "both of which lots of land we have set off to the said Perez for his share." The lots set off to the other heirs did not touch tide water, and need not be particularly referred to.

The premises demanded in this action are the land lying between high and low-water mark on the north side of the cove, between the point where the boundary of the first lot set off to the widow, as described in the commissioners' return, first comes "to the shore," and the bound therein described as "George Brightman's shore."

There was conflicting evidence upon the question whether the line, as described by the commissioners, between these two points, corresponded with high-water mark, and there was evidence tending to show that the shore varied in width from sixty to eighty feet between high and low-water mark. The demandants introduced evidence that the land of George Brightman so referred to (which is not demanded in this action) was known as the George Brightman marsh, was owned by George at the time of James Brightman's death, and was a parcel of marsh or

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meadow, including no beach, and extending to the tree mentioned in the assignment of dower.

The tenant, who holds deeds from the heirs of the land set off to the widow, contended that it extended to low-water mark, from the north line of the dower estate to the George Brightman marsh. The demandants, who are the heirs of James Brightman, contended that, according to the true construction of the commissioners' return, the widow's dower at this place only extended to high-water mark.

The justice of the Superior Court, before whom the case was tried without a jury, "ruled and found that, according to the true construction of the commissioners' report, in connection with other evidence in the case, the widow's dower took all the land, from the George Brightman marsh round to the north line of the dower, to low-water mark," and found for the tenant; and the demandants alleged exceptions.

By the law of Massachusetts, the proprietors of lands abutting on tide water have a title in the shore or flats to low-water mark, where the tide does not ebb more than one hundred rods, and may convey the upland and the flats, either separately or together. The strict legal meaning of the word "shore" is doubtless the land between ordinary high-water mark and low-water mark; and such is its common meaning as a definition of a boundary, when used by itself, and uncontrolled by other expressions in the deed or instrument of conveyance. But it may be shown by a consideration of the whole instrument, and of monuments referred to therein, to have been used untechnically, and without legal accuracy, as importing low-water mark. Anc. Chart. 148. *Storer* v. *Freeman*, 6 Mass. 435. *Jackson* v. *Boston & Worcester Railroad*, 1 Cush. 575, 579. *Saltonstall* v. *Long Wharf*, 7 Cush. 195, 201, 202. *Doane* v. *Willcutt*, 5 Gray, 328, 335. *Niles* v. *Patch*, 13 Gray, 254, 257.

Upon examination of the whole return of the commissioners, (the material parts of which have been already quoted,) we are of opinion that it manifests their intention and determination that the land set off to the widow as her dower should extend to low-water mark at the place in question. This is apparent from several considerations. It was the duty of the commissioners to divide the whole estate, and it is to be presumed that they have

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performed that duty. *Doane* v. *Broad Street Association*, 6 Mass. 332. *Clark* v. *Parker*, 106 Mass. 554. They have not assigned the fee of the shore in question to any other person. The land set off to the elder son on the other side of the cove, bounded "by the cove and river," clearly extended to low-water mark. *Boston* v. *Richardson*, 105 Mass. 351, 355, and cases cited. The right to "the seaweed that may wash up on the shore of the lots west of the road by the cove and river," "on all the land adjoining the river and cove," thus including both the land set off to the widow and that set off to the elder son, is assigned to the widow and the two sons, one third to each. In the absence of any such assignment, such seaweed would belong to the owners of the shores respectively; and the question of the nature of the right so assigned is not now presented for determination. See *Cohasset Proprietors* v. *Tower*, 24 Law Reporter, 734; *Phillips* v. *Rhodes*, 7 Met. 322; *Cushing* v. *Worrick*, 9 Gray, 382; *Anthony* v. *Gifford*, 2 Allen, 549. But the fact that the commissioners made a distinct assignment of the seaweed on both shores of the cove leads irresistibly to the conclusion that they understood they had set off, and that they did set off, the title in each of the shores. And their assignment of rights in the seaweed on both shores is followed by the concluding statement, that "all which four lots of land, together with the privileges above described," are set off to the widow for her dower. It may be added that the use of the words "George Brightman's shore," to designate a parcel of land which the evidence introduced by the demandants tended to prove was above high-water mark, shows that the word "shore" was used by the commissioners in a loose and general way, and without exact appreciation of its technical meaning.

The conclusion is that, by the true construction of the commissioners' return, the land set off to the widow at the place in question extended to low-water mark, and consequently that the tenant has a better title than the demandants to the demanded premises. *Exceptions overruled.*

L. Lapham & J. M. Morton, Jr., for the demandants.

J. Brown, (*J. M. Wood* with him,) for the tenant.

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WILLIAM POOLE *vs.* JOHN B. DYER & others.

Bristol. Oct. 24. — Nov. 28, 1877. LORD & SOULE, JJ., absent.

The sureties on a joint and several bond, given by them with A. and B. as principals, to dissolve the plaintiff's attachment of "the goods and estate of the said A. and B.," the condition of which is that A. and B. shall pay to the plaintiff "the amount, if any, which he shall recover in such action," are not discharged by the discontinuance of the action as to A.

CONTRACT against John B. Dyer, John Campbell and George Lord, on a bond, dated September 20, 1876, executed to the plaintiff by Ellen Dyer and John B. Dyer as principals, and by the other defendants as sureties; the condition of which was as follows:

"The condition of this obligation is such, that whereas the said William Poole has caused the goods and estate of the said Ellen Dyer and John B. Dyer, to the value of three hundred dollars, to be attached on mesne process, by virtue of a writ in favor of the said William Poole against the said Ellen Dyer and John B. Dyer, bearing date the thirteenth day of September, A. D. 1876, and returnable to the Second District Court of Bristol, for the county of Bristol, in said Commonwealth, on the fourth Monday of October, A. D. 1876, and whereas the said Ellen Dyer and John B. Dyer desire to dissolve said attachment according to law: Now therefore, if the said Ellen Dyer and John B. Dyer shall, within thirty days after the final judgment in the aforesaid action, pay to the plaintiff therein named the amount, if any, which he shall recover in such action, then this obligation shall be void; otherwise, it shall be and remain in full force and virtue."

Writ dated February 13, 1877. The case was submitted to the Superior Court upon an agreed statement of facts in substance as follows:

On September 19, 1876, the plaintiff attached the goods and estate of Ellen Dyer and John B. Dyer, on a writ returnable to the Second District Court of Bristol. For the purpose of dissolving such attachment, the bond in suit was given, and, on the execution and delivery of the bond, the goods and estate of both principals were so released from attachment. The original

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action was duly entered, the plaintiff discontinued as to Ellen Dyer, and judgment was entered against John B. Dyer. The plaintiff gave no notice to the sureties on the bond that he should or had discontinued the action as to Ellen Dyer; execution duly issued on the judgment against John B. Dyer, and was returned unsatisfied.

If, upon these facts, the sureties were discharged by the plaintiff's discontinuance as to Ellen Dyer, judgment was to be entered for them; otherwise, judgment for the plaintiff. The Superior Court ordered judgment for the sureties; and the plaintiff appealed.

H. K. Braley, for the plaintiff.

J. W. Cummings, for the sureties.

ENDICOTT, J. In the original action brought by the plaintiff, the property of both defendants was attached. They thereupon gave a bond to dissolve the attachment, upon which this action is brought. The plaintiff in the original action discontinued against one, and judgment was entered against the other defendant. It is now contended that this discontinuance discharged the sureties, and they are no longer liable on the bond; but the court is not of that opinion.

There is nothing in the langnage of the bond, or the circumstances under which it was given, to indicate that it was intended to be restricted to a judgment against both the original defendants. It dissolved an attachment made upon the property of each, and should therefore stand as security to the plaintiff for the default of either. If at the trial of the original action the plaintiff had recovered against one defendant only, the case would have fallen precisely within *Leonard* v. *Speidel*, 104 Mass. 356. The condition of the bond in that case was substantially the same as in this. See also *Campbell* v. *Brown*, 121 Mass. 516. The result, so far as the sureties are concerned, is the same whether the plaintiff discontinues against one defendant, or fails to recover against him upon trial. No change is made in the nature of the claim which is the subject of the suit, and no greater or different liability is cast upon the sureties by the discontinuance. *Sanderson* v. *Stevens*, 116 Mass. 133.

The case is clearly to be distinguished from *Tucker* v. *White*, 5 Allen, 322, and *Richards* v. *Storer*, 114 Mass. 101, relied on

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by the defendants. In those cases the plaintiff not only discontinued against one defendant, but summoned in another, and there was judgment against a new party not mentioned in the bond. *Judgment for the plaintiff.*

HELEN L. RAY *vs.* HENRY C. COFFIN.

Nantucket. Oct. 24. — Nov. 27, 1877. LORD & SOULE, JJ., absent.

In a bastardy case, where it appears that no accusation was made in time of travail, evidence that the complainant had never accused any man but the respondent of being the father of her child, is inadmissible.

COMPLAINT under the bastardy act.

At the trial in the Superior Court, before *Brigham*, C. J., the complainant testified, and the evidence tended to show that, in the time of her travail, she did not accuse any person of being the father of the child, although inquiry was made of her. The complainant and her mother, who was present at the time of the complainant's travail, were allowed to answer, against the respondent's objection and exception, the question whether the complainant had ever accused any other person than the respondent of being the father of the child. They replied "No."

After a verdict of guilty, the respondent moved in arrest of judgment, on the ground that the supplemental complaint did not allege that the child was born a bastard. The judge overruled the motion; and the respondent alleged exceptions.

J. Brown, for the respondent.

A. Coffin, for the complainant.

ENDICOTT, J. When a woman makes a complaint against a man, charging him with being the father of a bastard child, she may be a witness in support of her complaint; and if, in time of her travail, she accuses the same man of being the father of the child of which she is about to be delivered, and continues constant in her accusation, "the fact of such accusation in time of travail may be put in evidence upon trial to corroborate her testimony." Gen. Sts. *c.* 72, § 8. It is an accusation thus made and continued which may be put in evidence. And it may be

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proved by her own testimony or that of other witnesses. *Reed* v *Haskins*, 116 Mass. 198. But, if no accusation in time of travail is made, there can be no evidence that she continued to make it. In that case the trial must proceed, as if there was no such provision of the statute by which her testimony may be corroborated. And she cannot be allowed to prove that she has been constant in an accusation which she never made.

This distinction was not observed at the trial. It appeared that the plaintiff did not in time of travail accuse the defendant; and she and her mother were permitted to testify that she had never accused any man but the defendant of being the father.

The exception to the admission of this evidence is well taken, and, as there must be a new trial, we are not required to pass upon the alleged defect in the supplemental complaint, which may be cured by amendment, if necessary.

Exceptions sustained.

EDWARD BEHAN *vs.* JOHN J. WILLIAMS.

Essex. November 7, 1877. MORTON & SOULE, JJ., absent.

A bill of exceptions to the refusal of a judge to grant a new trial, asked for on the ground of newly discovered evidence, set forth the evidence at the trial and the new evidence, and stated that the judge decided that, upon this evidence, if proved, the verdict ought not to be set aside, and overruled the motion. *Held*, that no ground of exception appeared, and that the exceptions must be overruled with double costs.

MOTION by the defendant to the Superior Court to set aside a verdict for the plaintiff, on the ground of newly discovered evidence. Hearing before *Allen*, J., who allowed a bill of exceptions in substance as follows:

The original action was in contract to recover a balance of $2756.54, for brick and stone work in the erection of a church in Amesbury. The contract price for the brick work was $20 a thousand, and the contract provided that the bricks should be measured in the walls when the work was finished, and that twenty-five bricks should be allowed for each cubic foot. The only issue tried was as to the quantity of bricks laid.

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The plaintiff called two witnesses who testified to measurements of the brick work, one of whom testified that he had made careful and exact measurements, and had made a diagram of the building, containing his measurements of each part; that the measurements so appearing on his diagram were correct, and that his testimony as to the number of bricks laid was based upon his measurements as represented thereon. The diagram was offered in evidence by the plaintiff, but excluded on the defendant's objection. The witness was cross-examined by the defendant as to his measurements of some particular parts, and used the diagram to refresh his memory.

The defendant called two witnesses who testified to the results of measurements made by them, the measurements of one of them showing about eighty thousand, and those of the other about sixty thousand fewer bricks laid than was testified to by the plaintiff's witnesses.

At the hearing on the motion for a new trial, the defendant offered to prove that, after the trial, he sent competent persons to the church with the diagram, who went over all the measurements set down in it, and found several of them to be erroneous and untrue; and that the length and height and thickness of certain parts of the walls were so incorrectly set down in the diagram as to make it appear that there were over seventy thousand bricks more than would be shown by correct measurements.

The judge decided that upon these facts, if proved, the verdict ought not to be set aside, refused to hear the evidence, and overruled the motion. The defendant alleged exceptions.

C. F. Donnelly, for the defendant.

S. B. Ives, Jr., for the plaintiff, moved for double costs.

By the Court. The bill of exceptions does not show that the presiding judge excluded from his consideration any evidence offered by the defendant, or ruled on any question of law; but only that, assuming the truth of the facts offered to be proved, the judge, in the exercise of his discretion, refused to grant a new trial. Such refusal is clearly not a matter of exception. *Exceptions overruled, with double costs.*

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HENRY G. HUBON *vs.* JOSEPH BOUSLEY.

Essex. November 9, 1877. MORTON & SOULE, JJ., absent.

A decree establishing a mechanic's lien on a building and land, and ordering a sale of the same to satisfy the lien, upon a petition, inserted in a writ, under the Gen. Sts. *c.* 150, may be the subject of a writ of review, under the Gen. Sts. *c.* 146, or may be vacated, and the case brought forward on the docket for trial, under the St. of 1875, *c.* 33.

PETITION to the Superior Court, under the St. of 1875, *c.* 33 to vacate and review a decree of that court, establishing a mechanic's lien on a building and land, and ordering the same to be sold to satisfy the lien, upon a petition inserted in a writ of original summons, sued out by the respondent against the petitioner under the Gen. Sts. *c.* 150.

At the hearing in the Superior Court of this petition for a review, it was admitted that no sale had been made under that decree. *Gardner*, J., ruled that the decree was not a judgment in a civil action and could not be reviewed under the provisions of the Gen. Sts. *c.* 146; and that, for the same reason, it could not be vacated, and the case brought forward on the docket to be tried, under the provisions of the St. of 1875, *c.* 33; and therefore, without considering the merits of the petition, declined to grant it. The petitioner alleged exceptions.

S. Lincoln, Jr., for the petitioner, was stopped by the court.

N. J. Holden, for the respondent.

GRAY, C. J. A writ of review, under the statutes of the Commonwealth, may be granted of a final judgment in any civil action commenced by writ. It was because the proceedings were not commenced by writ, that a review was denied in the cases, cited for the respondent, of awards upon submissions before a justice of the peace, judgments upon petitions for partition, and decrees of probate or divorce. *Dickenson* v. *Davis*, 4 Mass. 520. *Stone* v. *Davis*, 14 Mass. 360. *Borden* v. *Brown*, 7 Mass. 93. *Pope* v. *Pope*, 4 Pick. 129. *Lucas* v. *Lucas*, 3 Gray, 136.

In an action commenced by writ, it is no objection to granting a review that the pleadings are not in the same form as in ordinary actions at law, or that no trial by jury is had; as, for instance, in the case of a judgment in trustee process, charging

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or discharging a trustee upon his answer. *Bowditch Ins. Co.* v. *Winslow*, 3 Gray, 415, 425. *Fuller* v. *Storer*, 111 Mass. 281, 283. In *Beale* v. *Churchill*, Norfolk, February term 1845, Mr. Justice Wilde granted a writ of review, under the Rev. Sts. *c.* 99, of a decree rendered by the Court of Common Pleas upon a bill in equity for the redemption of a mortgage, which had been inserted in a writ of original summons, as allowed by the Rev. Sts. *c.* 90, § 117. We are not certain whether the point was brought before the full court, but the opinion of that eminent judge is of itself, from his long experience and great knowledge of the law of Massachusetts, of much weight upon such a question.*

A mechanic's lien on buildings and land is enforced by petition to the Superior Court, which is a court of common law jurisdiction; "the petition may be inserted in a writ of original summons, and be served, returned and entered, as other civil cases;" and "the court may at any time allow either party to amend his pleadings as in actions at common law." Gen. Sts. *c.* 150, §§ 8, 10, 12. We can have no doubt that a final judgment upon such a petition, at least when, as in this case, that petition was inserted in a writ, may be the subject of a writ of review under the Gen. Sts. *c.* 146; or may, without the forms of granting and suing out a writ of review, be ordered to be vacated, and the case brought forward on the docket for trial, under the St. of 1875. *c.* 33, which allows final judgments in civil actions, when the execution has not been satisfied, to be more summarily reviewed in this manner.

Exceptions sustained.

* An examination of the note books of Chief Justice Shaw, in the possession of his son, Lemuel Shaw, Esquire, and of those of Mr. Justice Hubbard, then upon the bench, and Mr. Justice Metcalf, at that time reporter, both of which are preserved in the Social Law Library in Boston, makes it clear that the case did not come before the full court.

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ELIZABETH M. STUART *vs.* RICHARD STUART.

Essex. Nov. 8. — 28, 1877. MORTON & SOULE, JJ., absent

A conveyance and transfer by a husband of his property, in anticipation of his wife's filing a libel against him for a divorce and for alimony, and with intent to prevent the execution of any decree for alimony that she might obtain, does not of itself constitute a contempt of court; but such a conveyance and transfer, with the fact that the grantees were his son-in-law and daughter, are, upon a petition for an attachment for contempt for neglect and refusal to obey such a decree, competent evidence on the question whether the husband has in his possession or control the means of obeying the order of the court, and is consequently in contempt for disobedience.

In a case of divorce or alimony, a question of fact cannot be reserved on report for the full court.

PETITION, filed June 4, 1877, for an attachment for a contempt in neglecting and refusing to give bond to secure the payment of alimony in accordance with the terms of a decree of this court, rendered at April term 1877, upon the libel of the petitioner, filed May 19, 1876, and the default of the respondent, and granting her a divorce from the bond of matrimony, and ordering him to pay to her the sum of $250 and costs on May 1, 1877, and the further sum of $300 yearly until otherwise ordered, as alimony, in equal quarterly payments, beginning on August 1, 1877, and to file, within thirty days after notice after that decree, a bond issuing to her with sureties approved by the clerk of the court, for the payment of such alimony.

Hearing before *Lord*, J., who reported for the determination of the full court the question whether an attachment for contempt should issue upon the following facts:

It was admitted that the respondent had had due notice of the former decree, and had not filed a bond as thereby required. He was not present in person at the hearing, but alleged, through counsel, that he was unable by reason of physical disability to be present. An affidavit by him was filed, stating that he had no property, that he had sold all his property and had paid over the proceeds to the petitioner's attorney to satisfy the costs of the libel, and had made every effort to comply with the further terms of the decree, but was utterly unable to do so or to furnish sureties as required. There was no other evidence of any efforts to obtain a bond.

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In relation to the respondent's property it appeared as follows: The petitioner left the respondent in February, 1876, on account of his cruel and abusive treatment of her. In March, 1876, the respondent, in anticipation of proceedings for divorce, and with the intention and purpose of defeating and nullifying any decree of this court for the payment of alimony to her, made conveyances of a large amount of his property, both real and personal, to his son-in-law, for no consideration except a bond taken by him for his own support during his natural life; and a sum of money amounting to nearly $1000, not thus conveyed to his son-in-law, was placed in the hands of a daughter, with the same purpose and design.

H. Carter, for the petitioner.

D. Saunders & C. G. Saunders, for the respondent.

GRAY, C. J. This is a petition for an attachment for a contempt in neglecting and refusing to obey an order of this court, requiring the respondent to give bond for the payment of alimony to the petitioner. No question as to the form of the petition has been argued or considered. The only question reserved is whether, upon the facts stated in the report, an attachment should issue. But we have not sufficient facts before us to enable us to decide that question.

The respondent's conveyance and transfer of his property, in anticipation of his wife's filing a libel against him for a divorce and alimony, and with intent to prevent the execution of any decree for alimony that she might obtain, were a fraud upon her, for which she might in proper form have redress. *Burrows* v. *Purple*, 107 Mass. 428, 435. But they could not of themselves constitute a contempt of court; because a person cannot be in contempt of court for disobedience of an order not yet passed, in a suit not yet begun, and of which therefore he cannot have had notice. *Thompson* v. *Baskervill*, 3 Rep. in Ch. 114. *Winslow* v. *Nayson*, 113 Mass. 411. *In re Chiles*, 22 Wall. 157, 169.

Such conveyance and transfer by the respondent, with the fact that the grantees were his son-in-law and daughter, were competent evidence upon the question whether the respondent now has in his possession or control the means of obeying the order of the court, and is consequently in contempt for disobedience of that order. But this is a question of fact, which has not

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been passed upon below, and cannot be reported for the determination of the full court. Gen. Sts. *c.* 112, § 10. *Sparhawk* v. *Sparhawk*, 120 Mass. 390. The matter must therefore stand for *Further hearing before a single judge.*

City of Salem *vs.* William Maynes & another.

Essex. November 10. — 28, 1877. Morton & Soule, JJ., absent.

The Legislature may, in the exercise of the police power, and for the protection of persons and property against the dangers of fire, authorize cities and towns to restrict or prohibit the erection of wooden buildings within the municipality or any district thereof; and all contracts between individuals are subject to the exercise of this power.

A city ordinance, passed under the St. of 1872, *c.* 243, and providing that a wooden building shall not be built within a certain distance of another wooden building, applies to such a building erected after the ordinance took effect, although, before its passage, work was begun on the cellar upon the site of the proposed building, a contract was made for its erection, and lumber had been bought and prepared in accordance with the contract.

Bill in equity, filed July 19, 1877, against William Maynes and Henry W. Balcomb, under the St. of 1872, *c.* 243,* for the

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* "Section 1. Cities and towns may, by ordinances and by-laws not repugnant to the laws of the Commonwealth, prescribe rules and regulations for the inspection, materials, construction, alteration and safe use of buildings and structures within their respective limits, not owned or occupied by the United States or the Commonwealth, and excepting bridges, quays and wharves, for the purpose of securing the prevention of fire and the preservation of life; and may prescribe penalties, not exceeding one hundred dollars, for each and every violation of any provision of such ordinances or by-laws.

"Sect. 2. Such ordinances and by-laws may be made operative upon and within the whole territory of any city or town, or upon and within any prescribed and defined district or districts of such territory.

"Sect. 3. The Supreme Judicial Court, or any justice thereof, in term time or vacation, may, by injunction or other suitable process in equity, restrain any person or corporation from constructing, altering, maintaining or using any building or structure contrary to or in violation of any lawful ordinance or by-law made under or by virtue of this act, and may order and enforce the removal, or abatement as a nuisance, of any building or structure constructed, altered, maintained or used in violation of such ordinance or by-law."

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removal of a wooden building, alleged to have been erected in violation of an ordinance of the city of Salem, passed on April 23, 1877, establishing the limits of a fire district, within which the building was situated, and providing as follows:

"No person shall erect, or cause to be erected, within said district, any wooden building of more than fifteen feet in height from the foundation thereof (which foundation shall not exceed three feet from the level of the street) to the highest point of the roof, and covering an area of more than one thousand square feet of land; provided, that wooden buildings to be used for the purposes of dwelling-houses, not exceeding a height of forty feet above the grade of the street, and not covering an area of more than two thousand square feet of land, may be erected at a distance not less than eight feet from any other wooden building, measuring from wall to wall; and provided also, that any wooden dwelling-house may be erected at a less distance than eight feet from any other wooden building, by constructing the same with brick walls, either at the sides or ends thereof, as the inspector of buildings shall designate."

The case was submitted to this court upon the following facts:

On March 19, 1877, the defendant Maynes made a contract in writing with the defendant Balcomb, for the erection of a framed dwelling-house in accordance with certain specifications, by the terms of which Balcomb was to furnish the materials for and erect a portion of the building within eight feet of a wooden building upon adjoining land. The work under the contract was actually begun on March 14, 1877.

At the time of the passage of the ordinance, the timber and other material for the building had been purchased by Balcomb, the timber cut to dimension, including that for the end of the building in question, and work had been begun upon the cellar.

On May 15, 1877, before the cellar was completed, and before any portion of the superstructure was erected, the inspector of buildings called the attention of the defendants to the ordinance above named, and informed them that measures would be taken to enforce its provisions, and the defendants informed him of the existence of the contract referred to, and insisted upon their right to go on.

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On June 27, 1877, notices of their violation of the ordinance were served upon the defendants by the inspector of buildings, at which time the sills and the whole or a portion of the floor had been laid on the part of the building in question.

The western wall of a projection or L of the building, as finished, is twenty-two feet high above the foundation, and fifteen and one half feet wide, and stands at the distance of about eleven inches from the building on adjoining land above referred to, and parallel with the eastern side thereof, and is constructed wholly of wood.

J. A. Gillis, for the plaintiff.

W. D. Northend, for the defendants.

GRAY, C. J. There can be no doubt of the right of the Legislature, in the exercise of the police power, and for the protection of persons and property against the dangers of fire, to authorize cities and towns, by ordinances and by-laws, to restrict or prohibit the erection of wooden buildings within the municipality, or within any district thereof. *Respublica* v. *Duquet*, 2 Yeates, 493. *Wadleigh* v. *Gilman*, 3 Fairf. 403. All contracts between individuals, and even charters granted by the state, are subject to the exercise of this power. *Commonwealth* v. *Intoxicating Liquors*, 115 Mass. 153. *Woodlawn Cemetery* v. *Everett*, 118 Mass. 354. *Munn* v. *Illinois*, 94 U. S. 113.

The St. of 1872, *c.* 243, has conferred on the cities and towns in this Commonwealth authority to pass such ordinances and by-laws, and on this court jurisdiction in equity to restrain the construction of buildings in violation thereof. The case stated shows that the city of Salem duly passed an ordinance providing that no persons should erect or cause to be erected a wooden building exceeding certain dimensions within a fire district, the boundaries of which were fixed by the same ordinance; and that the defendants began to erect such a building within those limits after the ordinance took effect. The facts that, before the passage of the ordinance, the defendants had begun work on the cellar upon the site of the proposed building, and had made a contract between themselves for the erection of the building, and had bought and prepared lumber to carry out that contract, does not exempt them from the operation of the ordinance.

Decree for the plaintiff.

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JOHN REVERE & another *vs.* CITY OF BOSTON.

Suffolk. March 10, 1876; March 6. — Nov. 10, 1877. SOULE, J., absent.

The St. of 1872, c. 321, relating to the collection of taxes upon bank shares, did not apply to shares belonging to the estates of deceased persons.

CONTRACT to recover back taxes, assessed upon certain shares of stock in national banks, and paid under protest. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on an agreed statement of facts, the material part of which was as follows:

On March 1, 1871, the plaintiffs, residents of Boston, were duly appointed executors of the will of Frederic W. Lincoln, who died on January 10, 1871, a resident of Canton in this Commonwealth, and who owned the shares of stock in question in seven national banks located in Boston. In May, 1872, the cashiers of five of these banks returned the residence of the deceased as Canton, and the other two cashiers returned it as Boston. Notice was duly given by the executors to the cashiers of the banks, except, in the case of one bank, that the residence was Canton. In 1872, the assessors of Boston, knowing that the testator died a resident of Canton, assessed upon the plaintiffs the taxes in question. In the same year the assessors of Canton assessed all the shares in Canton.

The case was argued in March 1876, and reargued in March 1877. So much only of the argument is reported as is material to the understanding of the question of law decided.

H. G. Parker, for the plaintiffs.

J. P. Healy & H. W. Putnam, for the defendant. By the St. of 1872, *c.* 321, § 1, the cashier of every national bank is required to furnish, on or before the tenth day of May in each year, to the assessors of the town where the bank is located, a list "showing the name of each shareholder, with his residence, and the number of shares belonging to him" on May 1. By § 2, the assessors are to transmit a copy of the list, with the estimated value of the shares, to the tax commissioner. By § 8, the tax commissioner is to transmit a copy of the statement to the assessors of each city or town "where any person named as

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a shareholder" is stated to reside, or, in case of a corporation, to the assessors of the place where it is located. By § 4, the assessors of each city or town, "where any persons or corporations so named as a shareholder in any of such banks resides or is located," shall assess the shares, at the estimated value given in the statement. Section 6 is as follows:

"It shall be the duty of every shareholder in any of said banks, whether person or corporation, to give notice to the cashier of the bank in which such person or corporation owns shares, before the first day of May, in each year, a true statement of the place of residence of such person, or of location of such corporation, and keep such clerk so notified until the first day of May, in each year; and any such shareholder neglecting or refusing to give to the cashier of the banks in which such person or corporation owns shares, before the first day of May, in each year, a true statement of the city or town where such shareholder resides or is located, shall, for the purposes of taxation on said shares, be deemed to be an inhabitant of, or located in the city or town where such bank is located; but such person or corporation shall not be exempt from the payment of a tax legally assessed upon said shares in the city or town where such person or corporation resides or is located."

The plaintiffs, as executors, were the legal shareholders, and, they being residents of Boston, the shares were properly taxed there. If the shares are to be assessed under the Gen. Sts. *c.* 11, § 12, *cl.* 7, to the executors "in the place where the deceased last dwelt," the spirit of the St. of 1872, *c.* 321, § 6, requires the notice, in order that the cashiers may know what the place of residence of the deceased was at the time of his death, so that they may make the return required by § 1.

LORD, J. The decision of this case is not free from difficulty. It is quite apparent that the entire language of the St. of 1872, *c.* 321, § 6, is appropriate to living stockholders of banks, holding shares in their own right; and the question to be decided is, whether, in construing its language, we may make it properly applicable to stockholders holding shares in a representative capacity. It is to be borne in mind that, aside from this statute, shares of the stock held by proprietors in their own right are to be taxed in the towns in which such proprietors live, if

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domiciled within the Commonwealth; while shares held by executors or administrators are to be taxed in the town of which the deceased was an inhabitant at the time of his death, and shares held by trustees in the towns in which the *cestuis que trust* respectively reside.

If, therefore, we construe the language of the statute as applying to all stock, however held, we are necessarily constrained to adopt one of two results: either to construe the law as entirely changing the general system of taxation, and making the shares of stock belonging to the estate of a deceased person taxable where the executor or administrator happens to live, while as to all other parts of the personal estate no change is made; making such stock assessable in several different places, if there happen to be several executors or administrators residing in different towns; and making shares held in trust taxable where the trustees reside, or in the same manner dividing it in case there are several trustees, having different residences, while no change is made as to the municipality in which other parts of the property thus held are to be taxed; or we shall be compelled to give to the same word, used by the Legislature, two different significations, not in different portions of the same act, but by attaching to the same word in the same clause one meaning for one purpose and another meaning for another. For example, in § 6, which provides that "It shall be the duty of every shareholder in any of said banks, whether person or corporation, to give notice . . . . of the place of residence of such person, or of location of such corporation," the word shareholder, as to the duty of giving notice, means executor; but as to place of residence, it means testator. We cannot presume that such construction was intended. Nor can we construe the statute as intending to make a radical and fundamental change in the system of taxation of bank shares of a deceased person; making such shares taxable where the executor or administrator happens to reside, while all the other property of such deceased person follows the general rule of taxation, and is taxable in the place where the deceased was last domiciled.

It is by no means certain that the Legislature did not suppose that there already existed sufficient means to insure the taxation of property in bank shares held in a representative capacity.

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Executors and trustees are commonly appointed under the authority of the Probate Court; ordinarily, all the property which they hold is inventoried; and the Legislature might well have deemed the means of knowledge of the property of deceased persons sufficiently within the power of assessors; and certainly, if provision for notice in such case was omitted by the Legislature by design, it would be an unwarranted exercise of legislative power in the court to supply the omission by construction; and, if the omission were accidental, the remedy is to be afforded by the Legislature and not by the court.

Upon the whole matter, we feel much more safe to construe the language of the statute as to notice according to its natural import, and to hold that it does not apply to any bank shares except such as are held by some existing corporation, or are the property in his own right of some living person, capable of acting and of giving the notice required by the act. In this view of the statute, we neither enlarge nor limit the natural meaning of the language by construction; and if the Legislature shall deem any further provisions respecting the shares of bank stock belonging to deceased persons to be necessary, such provisions can be made in apt and unambiguous language.

It follows from this view, that the bank shares of the deceased were to be taxed in Canton, where all other of his personal property was taxable, and that the city of Boston, knowing the deceased to have been a resident of Canton at the time of his death, (though we do not deem this a material fact,) had no right to assess any of the shares as property taxable in Boston as the residence of the executor or testator, or as the locality of the bank. *Judgment for the plaintiffs.*[*]

Henry Clay *vs.* Horace M. Barlow.

Suffolk. November 14. — 16, 1877. **Colt & Ames, JJ., absent.**

The "debt or damages demanded" by which the St. of 1875, c. 106, § 1, regulates the jurisdiction of the municipal courts of Boston in civil actions, is the *ad damnum* in the writ, without regard to the amount claimed in the declaration or proved at the trial.

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[*] The St. of 1872, *c.* 321, was repealed by the St. of 1873, *c.* 315.

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A writ described the cause of action as "in an action of contract or tort;" and the declaration contained a single count in contract. The Superior Court overruled a motion to dismiss, and the defendant appealed. *Held*, that, so far as the objection related to the writ, the decision, by the Gen. Sts. *c.* 115, § 7, was final; and that, so far as it related to the declaration, it could only be taken by demurrer.

WRIT, dated February 21, 1876, returnable to the Superior Court, and describing each party as having his usual place of business in Boston in the County of Suffolk, and the cause of action thus: "In an action of contract or tort. To the damage of the plaintiff (as he says) the sum of five hundred dollars." The declaration filed with the writ contained a single count upon an account annexed for $81 for goods sold on December 21, 1875.

In the Superior Court, the defendant moved to dismiss the writ, for the following reasons:

"1st. This court has no jurisdiction of the cause of action, the amount claimed being less than $100, and all the parties to the writ belonging in Boston in the County of Suffolk.

"2d. The writ alleges the cause of action to be in contract or tort, but does not allege that the plaintiff is in doubt as to which it is, and the declaration does not pretend that it is in tort."

The court overruled the motion, and rendered judgment for the plaintiff for $84.80 damages, and $35.82 costs; and from the order overruling the motion to dismiss, the defendant appealed to this court.

T. Riley, for the defendant.

E. B. Callender, for the plaintiff.

GRAY, C. J. The words "debt or damages demanded," in the St. of 1875, *c.* 106, § 1, regulating the jurisdiction of the municipal courts of Boston, as in other statutes of the Commonwealth, defining the jurisdiction of courts by like words, refer to the *ad damnum* in the writ, and not to the amount claimed in the declaration or proved at the trial. *Chamberlain* v. *Cochran*, 8 Pick. 522. *Hapgood* v. *Doherty*, 8 Gray, 373. *Trees* v. *Rushworth*, 9 Gray, 47. *Ladd* v. *Kimball*, 12 Gray, 139. *Ashuelot Bank* v. *Pearson*, 14 Gray, 521.

The other objection, so far as it relates to the writ, was for a defect of form in process, upon which the decision of the court below was final; and, so far as it relates to the declaration,

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could not be taken otherwise than by demurrer. Gen. Sts. c. 114, § 10; c. 115, § 7 c. 129, § 2, cl. 5; §§ 7, 12. *Barlow* v. *Leavitt*, 12 Cush. 483. *Judgment affirmed.*

CHARLES J. LITTLE *vs.* PHŒNIX INSURANCE COMPANY.

Suffolk. March 12. — Nov. 19, 1877. ENDICOTT & SOULE, JJ., absent.

Household furniture belonging to A. was sold to B. and a receipted bill of parcels given, signed by A. B., while the furniture was in the possession of A., in a house belonging to C., wrote on the bill of parcels, "I hereby transfer and sell all of the above furniture to C.," signed the writing, and delivered it to C., who went to the house and saw the property, and it was orally agreed that the property should remain in the custody of A., but that possession of it was given to and received by C., and that the legal title was to be in him. C. took out a policy of insurance on the property, against loss by fire, in which it was described as "his household furniture," in a house, the location of which was described. During the term of the policy, and while the furniture remained in the house, a loss occurred. *Held*, that C. had an insurable interest in the furniture; that it was properly described; and that there was no material concealment or misrepresentation, in failing to state that the property was in a house occupied by A. *Held, also*, that statements made by C. under oath, in proofs of loss, "that the property belonged exclusively to the assured, and that no other person had any interest therein," and that "the articles named belonged to and were in the possession of the assured at the time of the fire," did not amount to fraud or false swearing, within a clause in the policy requiring proofs of loss, and providing that any fraud or false swearing should forfeit all claim under the policy.

A mistake of fact or honest misstatement under oath, on the part of an assured, does not amount to fraud or false swearing, within the meaning of those words in a policy of fire insurance.

A policy of insurance against fire was issued by a foreign stock company, through its agents in this Commonwealth, on household furniture. The policy provided that, in case of loss, the insured should "forthwith" give notice thereof to the company, and, "as soon after as possible," make formal proof of loss, after which the company was to have sixty days in which to pay the loss; and that no action should be brought on the policy unless begun within twelve months of the loss. In an action begun on September 3, 1875, there was evidence that the loss happened on January 26, 1874; that the insured gave notice forthwith of the loss to the agents from whom he procured the policy, and who referred him to one P. as the adjuster for the company, to whom he gave a memorandum of the furniture destroyed; that P. made no objection to its form, and both acted on it as sufficient, the only difference between them being as to the amount of the loss; that, in July the agents who had issued the policy ceased to act, and the negotiations were continued with one T., as general agent of the company, who testified, for the defendant, "that he succeeded P. in the business:" that he received the memorandum from P. in September, and made no objection to its sufficiency; that the insured,

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after this, not finding T. at his office, though he called several times, went to the state where the company had its office, and saw the vice-president, who referred him to T.; that T. encouraged him to believe that the case would be settled, and promised to meet him; that, on November 25, the insured wrote to the company about the matter, and stated that T. had promised to see him, but had not done so; that the secretary of the company replied that T. had been kept busy at the office, and that the company was not aware that any proof of loss had yet been furnished the company; that this was the first intimation the insured had that any objection was taken to the proofs of loss; that in December he wrote to T. and expressed a wish to see him soon, but received no reply; that no further communication was had until March 30, 1875, when the insured sent formal proofs of loss, and asked for an interview with T., and received a reply signed by T., with the words "general agent" added, in which he said that an interview would be useless, "as we cannot admit any liability." *Held*, that the evidence was sufficient to warrant the jury in finding that P. and T. acted as general agents, with the knowledge and approval of the company, having authority to settle the loss, and that they waived the formal preliminary proofs of loss required by the policy; and also in finding that the agents of the company delayed a settlement upon the pretence that they were seeking to adjust the loss, and, while admitting the liability of the company, intended to prolong the negotiation and induce the plaintiff to forego his action for twelve months; and that they wilfully and in bad faith misled him in this respect, and prevented him from so bringing his action; and that, this being so, the action could be maintained

CONTRACT upon a policy of insurance, by which the defendant insured the plaintiff against loss or damage by fire, in the sum of $3000, "on his household furniture, useful and ornamental, wearing apparel, musical instruments, plate, plated ware, books, pictures, engravings, statuary and ornaments, situate in frame dwelling-house on North Beacon Street, corner of Chester Street, Brighton," from August 19, 1872, to August 19, 1877. The policy contained the following provisions:

"And the assured hereby covenants and engages that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the assured, and material to the risk; and that, if any material fact or circumstance shall not have been fairly represented, or if the assured shall make any attempt to defraud the said company; that in every such case the risk hereupon shall cease and determine, and the policy be null and void, — unless confirmed by a new agreement thereupon, written after a full knowledge of such facts and circumstances."

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"And the assured further covenants and agrees that, in case of any loss or damage, the said company shall have the right to enter upon and rebuild or repair the premises, or replace the property lost or damaged with other of the same kind and equal goodness, at any time within ninety days after due notice of the loss, or such further time as may be reasonable, or to pay for the same in sixty days after proof of the loss or damage thereon."

"All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company; and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; they shall also declare, on oath, whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied, at the time of the loss, and who were the occupants of such building, and when and how the fire originated, as far as they know or believe; and also, if required, shall produce their books of account and other proper vouchers; and, until such proofs are furnished, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing, the insured shall forfeit all claim under this policy."

"It is expressly covenanted by the parties hereto, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless commenced within twelve months next after the loss shall have occurred; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

"This policy is made and accepted upon the above express conditions, but shall not be valid until countersigned by the duly authorized agents of the Phœnix Insurance Company, at Boston, Mass."

Writ dated September 3, 1875. The declaration alleged the making of the policy on the plaintiff's household furniture, a

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loss by fire on January 26, 1874, the giving of immediate notice of said loss by the plaintiff to the defendant, and the furnishing the proof of loss required by the policy in November following; that the delay in furnishing the proof of loss and in bringing suit upon the policy was caused by the negligence and improper action of the defendant; and that the defendant waived the conditions of the policy thereunto appertaining.

The answer contained a general denial; alleged that the proof of loss was not furnished nor the action begun within the time required by the policy; and that, if the plaintiff had any cause of action on March 30, 1875, the same was forfeited by the plaintiff's false swearing, in the proof of loss of that date, in regard to the amount and value of the property on the premises described, and in regard to the plaintiff's interest therein.

At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions, the material parts of which appear in the opinion.

E. D. Sohier & J. D. Bryant, for the defendant.

R. M. Morse, Jr., for the plaintiff.

COLT, J. The plaintiff's title to the furniture insured was acquired by bill of sale from Charles Green, absolute in form, but intended by the parties only as security for money lent. The property at the time of the sale was in a dwelling-house owned by the plaintiff, but occupied up to the time of the fire by Green. The parties to the sale went to the house, saw the property, and declared that possession of it was given to and received by the plaintiff. It remained in the custody of Green, but it was understood that while the latter was to have the use of it, the legal title was to be in the plaintiff. The furniture belonged originally to one Charles Green, who sold it to Paul B. Green, and gave to him a receipted bill of parcels, at the bottom of which, at the time of the sale to the plaintiff, was written the words, "I hereby transfer and sell all of the above furniture to Charles J. Little, of Boston, Mass." This addition was duly dated, signed by Paul B. Green, and delivered to the plaintiff.

1. The defendant contends that on this evidence the plaintiff had no insurable interest in the goods, because there was only a pledge of the property to secure the payment of money, the lien on which was lost by allowing the goods to remain in the [illegible]

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session of the pledgor. But the written instrument produced is something more than an informal bill of parcels. It is sufficient to transfer the legal title, and it is evident that both intended that the legal title should be held by the plaintiff as security. Such an intention is inconsistent with a pledge by which the title remains unchanged in the pledgor, subject only to the lien.

The question is not as to the validity of the transfer as against creditors or subsequent purchasers. It is sufficient that the plaintiff acquired a title to the specific property insured which had not been defeated by creditors or otherwise at the time of the fire, and by the destruction of which he has suffered direct loss to the value of the property destroyed. *Haley* v. *Manufacturers' Ins. Co.* 120 Mass. 292, 296. *Eastern Railroad* v. *Relief Ins. Co.* 98 Mass. 420, 423. *Williams* v. *Roger Williams Ins. Co.* 107 Mass. 377, 379. *Clark* v. *Washington Ins. Co.* 100 Mass. 509.

We do not see that the defendant has any just cause to complain of the instruction given upon this point.* For the reason above stated, it cannot be fairly said that it was inapplicable to the facts, or tended to mislead the jury. The instruction requested was properly refused.† The transaction, as we have seen, could not be construed as a pledge, and, in the absence of any written condition, it could not in law, at least, be treated as a mortgage. *Pennock* v. *McCormick*, 120 Mass. 275. In legal effect it was a sale, with a right on the part of the seller by verbal agreement to repurchase.

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* This instruction was as follows: "If the plaintiff had paid to Green the sum of $2000, and had received from him a bill of sale and delivery of the property, the plaintiff had an insurable interest therein, to the extent at least of the money paid therefor, though there may have been an understanding between the plaintiff and Green that, on repayment of the money, he would reconvey the property to him."

† This request was as follows: "The delivery to the plaintiff, as security for a loan made by him to Green, of a bill of parcels or a bill of sale of the furniture in the house occupied by Green, if the furniture thereafter remained, as before, in the possession of Green, and if the instrument was not recorded, would not in law make the plaintiff the owner of such property, as against third parties, and would not make the property 'his' in such sense as to support the policy in this case."

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2. The property was described in the policy, and is alleged in the plaintiff's declaration, to be the plaintiff's household furniture. But the considerations above stated dispose of the objection that the plaintiff had no such property as he caused to be insured and as he alleged in his writ. The jury were justified in finding that the legal ownership of it was in the plaintiff.

3. There was no material concealment or misrepresentation, in the absence of any inquiry or express stipulation on the subject, in failing to state that the property was in the custody of a lessee of the plaintiff. It was truthfully described as his household furniture, although it was not in his actual custody or in a house occupied by him. The written part of the policy gives accurately the location of the building in which it was placed.

4. The statements in the printed part of the proofs of loss "that the property belonged exclusively to the assured, and that no other person had any interest therein," and that "the articles named belonged to and were in the possession of the insured at the time of the fire," do not, in law, amount to fraud or false swearing within the terms of the policy. The jury may well have found that the plaintiff had the absolute and exclusive legal title; and, as to the possession of the assured at the time of the fire, it is stated, in the clause immediately preceding the statement relied on as false and fraudulent, that the building containing the property destroyed was occupied in its several parts by Green and his family as a dwelling-house.

5. The instructions given as to the effect of misstatements in the proofs of loss were correct.* The condition in the policy is

* These instructions were as follows: "If, in any proof of the loss, the plaintiff wilfully or recklessly swore to that as true of which he was ignorant and which was not as sworn to, or if he swore to a statement as true which he knew to be otherwise than true, he would in either case by such false swearing forfeit all claim under the policy, and this action could not be maintained. This does not apply if a party by mistake should make a misstatement accidentally, not intentionally or wilfully; the word 'wilful' is not used in the sense that he did not intend to write those words, but that there was wilful intention in him to misrepresent. Every man is bound to exercise good judgment; if he recklessly, — in other words, carelessness or simple mistake on his part would not be sufficient, but if there was recklessness in making the statement, or it was wilfully made wrong, — then that would forfeit the claim under the policy."

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that the insured shall forfeit all claim under it, if there appears any fraud or false swearing. This implies something more than some mistake of fact or honest misstatements on the part of the assured; unless, indeed, the mistake be in the misstatement of a fact which avoids the policy by its express terms, as in *Campbell* v. *Charter Oak Ins. Co.* 10 Allen, 213. The instruction requested on this point was properly refused.* *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416. *Curry* v. *Commonwealth Ins. Co.* 10 Pick. 535.

6. The jury must have found, under instructions not open to objection, that the defendant, through agents, by whose acts and declarations it was legally bound, had waived the formal proof of loss required by the policy, and had waived or was estopped from setting up the express stipulation that no suit for the recovery of any claim under the policy should be sustained unless commenced within twelve months next after the loss should have occurred. The fire occurred on January 26, 1874. It was conceded that no proof of loss, such as the policy required, was made out until March, 1875, and that no action was commenced until September following. All the evidence upon these points is reported. At the conclusion of the plaintiff's case, and again when all the evidence was in, the defendant asked the court to rule that there was no evidence to warrant a verdict for the plaintiff. Upon a careful examination of the report, we are of opinion that this request was rightly refused. It is a question of the sufficiency and not of the weight of the evidence.

The defendant is a foreign stock company, and its business in the Commonwealth must be mainly transacted through agents appointed by the managers of the home office. The plaintiff obtained this policy from Hovey & Fenno, of Boston, who were authorized to take risks, fill out policies and sign indorsements as agents for the defendant. At the same time the plaintiff took from them a separate policy for a much larger amount on

* This request was as follows: "If the plaintiff, in any paper offered by him as a proof of loss, stated that the property described in the policy in suit belonged exclusively to himself, and that no other person had any interest therein, when in fact he was only a pledgee or mortgagee thereof, and not in possession, such false swearing would avoid the policy."

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the dwelling-house which contained the furniture in question. Immediately after the fire, he notified these agents of the loss on both policies and was referred to one Pierson, as the adjuster for the company. He gave to Pierson, at his request, a memorandum or list of the furniture claimed to have been destroyed, and proceeded first to settle with him by arbitration the loss upon the house, and received through him, from the company, at the office of the agents in Boston, in May or June following, by a draft filled out by him, substantially the full amount of the insurance on the house. Pierson took the memorandum of the furniture without any objection to its form, and there was evidence that both parties acted on it as sufficient proof, the only matter of difference being as to the value of the furniture and the loss of some of the items in the list. While the negotiations for the settlement of the loss on the house were pending, and until July, 1874, frequent interviews were had with Pierson in reference to the loss on the furniture, without any objection made that no formal proof of loss had been presented. In July, Hovey & Fenno and Pierson ceased to act for the defendant, and the negotiations were continued with Tainter, as general agent for the company, who was a witness for the defendant, and who testified that he succeeded Pierson in the business. He received from Pierson in September the memorandum of furniture lost, satisfied himself as to what articles named in it had been saved, but, as the plaintiff testified, made no objection that it was not sufficient as proof of loss within the requirements of the policy.

The plaintiff having called several times at the office in Boston without finding Tainter, went to Hartford in October, and there met the vice-president, who committed the matter to Tainter for settlement. He was encouraged by the latter to believe the case would be settled. He exhibited his bill of sale of the furniture to Tainter, furnished him with a copy, and the latter promised to notify the plaintiff when he was in Boston, so that he could meet him, but failed to give any such notice.

On November 25, the plaintiff wrote to the company at Hartford, asking to be informed of its decision, and stating that Tainter had promised to see him in Boston in regard to this insurance, "where he should be in a few days and quite often thereafter."

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To this the assistant secretary replied that Tainter had been kept busy in the office, and was unable to visit Boston, and added that the company was not aware that any proof of loss had as yet been submitted. This was the first intimation, as the plaintiff testified, that any exception was taken to the proofs of loss.

In December he wrote to Tainter, expressing a hope to see him soon, to which no answer was made, and no further communication was had between them until March, when the plaintiff, as he testified, from extra caution, sent on formal proofs of loss, and expressed his wish to meet Tainter at Boston; to which he received a reply signed by Tainter, with the words "general agent" added, in which he stated that an interview would be useless, "as we cannot admit any liability." This was the first time that there was a distinct denial of all liability.

In all this, there was some evidence that both Pierson and Tainter acted as general agents, with the knowledge and approval of the company, having authority to settle the loss in question. The testimony of Tainter, that he succeeded Pierson, implies that the latter acted in the same relation and performed the same work for the company. There was evidence that they were charged with the whole duty of settling the loss, and in this respect represented the company. As a necessary incident, they had power to dispense with those stipulations for the benefit of the company, which had reference to the mode of ascertaining the liability and limiting the right of action. *Eastern Railroad* v. *Relief Ins. Co.* 105 Mass. 570. *Kennebec Co.* v. *Augusta Ins. Co.* 6 Gray, 204. *Gloucester Manuf. Co.* v. *Howard Ins. Co.* 5 Gray, 497.

As to the proof of loss, it is held that a general refusal to pay, followed by negotiations with the insured for a settlement, without objection to the form of the proof, will be a waiver of such objection. *Graves* v. *Washington Ins. Co.* 12 Allen, 391. Good faith requires in such case notice of the objection. *Heath* v. *Franklin Ins. Co.* 1 Cush. 257. *Eastern Railroad* v. *Relief Ins. Co.* above cited. And this rule is equally applicable to mutual insurance companies, however they may differ in respect to the power of their officers and agents to vary other essential stipulations of the contract. *Underhill* v. *Agawam Ins. Co.* 6 Cush.

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440. *Brewer* v. *Chelsea Ins. Co.* 14 Gray, 203. *Priest* v. *Citizens' Ins. Co.* 3 Allen, 602, 605. *Blake* v. *Exchange Ins. Co.* 12 Gray, 265. There was sufficient evidence in the declarations and conduct of the defendant's agents to warrant the jury in finding a waiver in the formal preliminary proofs required by the policy.

In respect to the effect to be given to the limitation clause contained in the policy, the jury must have found, under the instructions given, that the agents of the company delayed a settlement upon the pretence that they were seeking to adjust the amount of the loss, and, while admitting the liability of the company, intended to prolong the negotiation and induce the plaintiff to forego his suit for twelve months, by leading him to believe that they did not intend to rely on the clause in question; that they wilfully and in bad faith misled him in this respect and prevented him from bringing his action within the time named.

Such a question is peculiarly proper for the consideration of the jury. It involves the existence of bad faith on the part of the defendant, and that fact is more commonly inferred from the surrounding circumstances, which are sufficiently significant in character, than proved by direct and positive evidence. It depends largely upon the appearance of the several witnesses upon the stand. In deciding whether there is evidence in the case to support this finding, we give no consideration to the fact that much of it is contradicted. It is enough that the conduct, declarations and delay of the defendant's officers and agents, according to the plaintiff's testimony, would justify the inference that they were acting in bad faith for the purpose alleged, and that the first notice of the insufficiency of the proof was given so late, that, allowing sixty days after proof of loss for the time which the company has to pay in, there would be left no time to commence an action within the twelve months required. But without going into a detailed review of all the evidence, it is sufficient that we cannot say, as matter of law, that there was not enough to sustain the verdict. *Fullam* v. *New York Ins. Co.* 7 Gray, 61, 63. *Ames* v. *New York Ins. Co.* 4 Kernan, 253. *Gooden* v. *Amoskeag Ins. Co.* 20 N. H. 78.

Exceptions overruled

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ROBERT O. TREADWELL & others *vs.* JOHN MARDEN & others.

Suffolk. Nov. 15. — 19, 1877. COLT & AMES, JJ., absent.

Where, by the terms of a lease, rent is payable at stated times during the term, and the lessee becomes a bankrupt, the rent is, under the U. S. Rev. Sts. § 5071, considered as accruing from day to day; and an action can only be maintained for that part of the rent which accrued after the bankruptcy.

CONTRACT to recover a monthly instalment of rent, alleged to have been payable by the defendants to the plaintiffs on June 7, 1876. Trial in the Superior Court without a jury, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The plaintiffs leased to the defendants an estate in Boston, for the term of one year from November 7, 1875. By the terms of the lease the defendants covenanted to pay an annual rent of $2000, in monthly instalments of $167.67, on the seventh day of every month, beginning on December 7, 1875.

On May 26, 1876, the defendants filed their petition in bankruptcy in the District Court of the United States for the District of Massachusetts, and on June 1, 1876, were duly adjudicated bankrupts. The defendants pleaded their bankruptcy in bar of the action, and it was agreed that the same effect should be given to the plea as if a discharge in bankruptcy had been pleaded.

Upon these facts the defendants asked the judge to rule that their bankruptcy was a bar to the plaintiffs' right to recover, and was a release from all liability accruing after the date of filing the petition. The judge declined so to rule, but ruled that as the right of action under the lease arose subsequently to the defendants' adjudication in bankruptcy, their bankruptcy was no bar to the plaintiffs' right to recover; and found for the plaintiffs in the sum of $166.67. The defendants alleged exceptions.

C. H. Chellis, for the defendants.

J. P. Treadwell, for the plaintiffs.

MORTON, J. The bankrupt law provides that a discharge duly granted shall, with certain exceptions which do not apply in this case, "release the bankrupt from all debts, claims, liabil-

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ities and demands which were or might have been proved against his estate in bankruptcy." U. S. Rev. Sts. § 5119. It also provides that "where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." § 5071.

This action is brought to recover a month's rent under a lease, a part of which, if the rent is to be regarded as growing due from day to day, accrued before the bankruptcy of the defendants, and a part afterward. For the proportionate part up to the time of the bankruptcy, the plaintiffs are entitled to prove against the estate in bankruptcy, and the discharge is a release of that part. For the part growing due after the time of the bankruptcy the plaintiffs are entitled to recover, as the discharge does not release it. *Ex parte Houghton*, 1 Lowell, 554.

It follows that the ruling of the Superior Court was erroneous. But as the plaintiffs, upon the admitted facts, are entitled to judgment for an ascertained part of their claim, there is no occasion for a new trial. If the plaintiffs will remit the proportionate part of their claim which grew due before the bankruptcy of the defendants, the exceptions will be overruled, otherwise the exceptions must be sustained. *Order accordingly.*

HENRY B. WILLIAMS *vs.* SAMUEL P. ALLEN.

Suffolk. November 15. — 21, 1877. COLT & AMES, JJ., absent.

A. and B., owners of separate parcels of land, entered into an agreement, by the terms of which B. was to convey his land to A., and, in payment therefor, A. was to convey his land to B., subject to two mortgages, "all taxes, insurance and interest to be adjusted to September 1." The taxes on the land of A., and the interest on the two mortgages estimated *pro rata* to September 1, amounted to a certain sum, against which the insurance on the estate of A., assigned to B., and the taxes on the estate of B., also estimated *pro rata* to September 1, were offset, leaving a balance to be paid by A. The deeds were passed, and A. paid the balance to B. *Held*, that B. was bound to apply such balance to the payment of interest and taxes on the estate conveyed to him; and that an oral promise so to do was for a sufficient consideration.

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CONTRACT for money had and received. Trial, without jury, in the Superior Court, before *Wilkinson*, J., who found for the plaintiff, and allowed a bill of exceptions, the substance of which appears in the opinion.

S. Snow, for the defendant.

R. M. Morse, Jr., for the plaintiff.

ENDICOTT, J. The plaintiff being the owner of an estate in Boston, subject to two mortgages amounting to $22,000, and the defendant being the owner of an estate in Cambridge, they entered into an agreement in writing for the sale and exchange of their estates. The agreement provided that the defendant should convey the estate in Cambridge to the plaintiff, and, in payment therefor, the plaintiff should convey to the defendant the estate in Boston, subject to the two mortgages, and also give to the defendant mortgages on the Cambridge estate to the amount of $11,500, and "all taxes, insurance and interest to be adjusted to September 1, 1875." When the parties met to execute the deeds and carry out the agreement, it was found that the taxes on the estate in Boston, and the interest on the two mortgages for $22,000, estimated *pro rata* to September 1, amounted to $759.53; against this sum, the insurance on the estate in Boston, which was assigned to the defendant, and the taxes on the estate in Cambridge, also estimated *pro rata* to September 1, were offset; and it was agreed that there was a balance of $600 against the Boston estate, to be paid by the plaintiff. The deeds were passed, and the sum of $600 was paid by the plaintiff to the defendant.

The defendant conveyed the Boston estate to a third person, by a quitclaim deed, subject to all incumbrances, and gave notice thereof to the holder of the second mortgage, before October 1, 1875. The instalments of interest due on that day, and the taxes for 1875, were not paid, and, in consequence of such non-payment, the estate was sold by the holder of the first mortgage, under a power of sale contained in his mortgage, and was bought by the holder of the second mortgage, by agreement with the plaintiff, and for his benefit.

The defendant denies that he is bound by the agreement to apply the $600 to the payment of interest and taxes on the estate in Boston, and contends that, if he did so agree, it was with

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out consideration. But we are of opinion, that the fair construction of the agreement is that any sum received by either party on the adjustment of taxes, insurance and interest, as of September 1, must be devoted by the party receiving it to the purposes for which it was paid. The presiding judge having so ruled, and having also found as a fact that the defendant orally promised, when the deeds were delivered, to apply the $600 to the payment of interest and taxes when the same should mature, we fail to find any ground of exception. Upon the case as presented, the plaintiff is entitled to recover, and the entry must be

Exceptions overruled.

JAMES MACKINTOSH *vs.* ELIOT NATIONAL BANK.

Suffolk. November 22, 1877. COLT & LORD, JJ., absent.

A bank, which pays out money on a check, purporting to be signed by a depositor, but the signature on which is in fact forged by his clerk, is not, in the absence of evidence that the clerk had, or was supposed by the bank to have, any authority to sign the depositor's name, exempt from liability to the depositor, by proof that the forgery was committed on a blank form taken from the depositor's check book, which was left lying about in his office during the day; that it was stamped with a hand stamp, sometimes used on his checks, and which was accessible to any one in the office; that the clerk was allowed to fill up checks, and was introduced by the depositor to the officers of the bank as the person who was authorized to receive money on the depositor's checks.

CONTRACT to recover $1706.87 deposited with the defendant and standing to the credit of Seaman & Co.

At the trial in the Superior Court, before *Putnam*, J., it appeared in evidence that the plaintiff carried on business under the name of Seaman & Co.; that three checks for $850, $658.50 and $198.37 respectively, purporting to be signed by Seaman & Co., were paid by the defendant, the signatures of all of which were admitted to be forgeries; that the defendant contended it was not liable, because it was through the fault of the plaintiff induced to pay the checks; that the plaintiff had in his employ one Hall, by whom it was agreed that the forgeries were committed; that the check for $850, which was stamped with the hand stamp of the firm, was paid by the defendant to Hall; and

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that the checks for $658.50 and $198.37, the first of which was also stamped with the hand stamp of the firm, were delivered by Hall to Worster & Babson in payment for gold purchased, were indorsed and deposited by them, and paid by the defendant through the clearing-house.

Francis Harrington, the paying teller of the defendant bank, testified that the plaintiff brought Hall to him, and introduced him to him some months before these checks were paid as a proper person to pay money to on the plaintiff's checks, and said that he would do the business at the bank; that, after this introduction, Hall came to the bank with checks of Seaman & Co., and received the money on them; that he paid to Hall the check for $850; that the other two came through the clearing-house, and he paid the money on them; that the two larger checks had stamps on them; that he had very frequently seen a similar impress on the genuine checks; that he had paid checks signed Seaman & Co., and payable to Hall's own order, which Hall had indorsed in his presence, at the time of payment; that Hall had frequently brought in checks, which were filled in with his own handwriting in the body of them; that the check for $850 was presented by Hall as agent of Seaman & Co.; that it was filled in, in the body of it, with the handwriting of Hall; that it bore the stamp of Seaman & Co.; that that had some effect on him in inducing him to pay it, though he should have paid it, without that, on the strength of the introduction; that the check for $658.50 had the indorsement of Worster & Babson, and had the stamp, and those facts had some effect on him in inducing him to pay the check, and the signature to the check appeared all right. On cross-examination Harrington said that the check for $198.37 had not the hand stamp on it, but had the indorsement of Worster & Babson, and that had some effect on him, but he relied on his own judgment as to the signature to the check; that he did not compare it with any other signatures; that he understood that the object of the introduction by the plaintiff was to identify Hall as the proper person to pay the money to, on Seaman & Co.'s checks; and that he was very familiar with the signature of Seaman & Co.

Royal B. Conant, the cashier of the defendant bank, testified that the plaintiff brought Hall into the bank and introduced him

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to him; that he said, "This is Mr. Hall, who will hereafter do my banking business; what he does will be all in order, correct, or right, or something to that effect." On cross-examination he stated that he understood that it was an introduction, merely an identification of the party; and that he did not understand, from what the plaintiff said, that Hall was authorized to sign his name as Seaman & Co.

The plaintiff introduced in evidence the report of an auditor in his favor, by which it appeared that Hall filled checks very often and numbered the check book when he filled such checks, and that the check book was lying about in the plaintiff's office during the day, and the hand stamp of the firm was accessible to any one in the office, the hand stamp being very seldom used.

The plaintiff contended that, it being conceded that the signatures on the checks were forged, there was nothing in the evidence to exonerate the defendant from liability. The judge so ruled, directed a verdict for the plaintiff, and, by consent of parties, reported the case for the consideration of this court. If the rulings were correct, judgment was to be entered upon the verdict. If the rulings, or either of them, were incorrect, the verdict was to be set aside, and the case to be returned for a new trial.

F. Goodwin, for the defendant.

D. F. Fitz, for the plaintiff, was not called upon.

GRAY, C. J. The defendant bank must bear the loss of the amounts which it paid upon the forged checks. There was no evidence tending to show that the plaintiff's clerk had, or was understood by the defendant's officers to have, any authority to sign his name. The plaintiff cannot be held bound by his clerk's unauthorized and criminal acts, upon any ground that would not make every merchant who keeps on his desk in his counting-room for his own use a check book containing blank forms stamped or engraved with his name, and who sometimes directs his clerk to fill them up for himself to sign, responsible for any number and amount of such checks to which the clerk may forge the signature of his employer. The cases cited in argument have been so fully considered in the recent case of *Greenfield Savings Bank* v. *Stowell*, *ante*, 196, that there is no occasion to discuss them again. *Judgment on the verdict.*

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GEORGE M. COOK & others *vs.* CHARLES K. BASLEY.

Suffolk. November 21. — 26, 1877. COLT & LORD, JJ., absent.

If a third mortgagee of land, which is subject also to a fourth mortgage, sells, under a power of sale contained in his mortgage, the entire title in the land, with the assent of the prior mortgagees, for a sum sufficient to pay off all the four mortgages, the fourth mortgagee can maintain an action against him for money had and received.

CONTRACT for money had and received. At the trial in the Superior Court, before *Gardner*, J., the material facts appeared to be as follows:

Caleb C. Thomas, owning a lot of land, made two mortgages thereof to one Capen, a third mortgage to the defendant, and a fourth mortgage to the plaintiffs. All the debts secured by the mortgages being overdue and unpaid, and Thomas still owning the equity of redemption, the defendant entered for breach of condition of his mortgage, and advertised and sold the premises, under the power of sale contained therein, for a sum sufficient to pay the costs and expenses of the sale, and the amounts due on all the four mortgages. The defendant contended that the plaintiffs, as subsequent mortgagees, could not maintain this action, whatever other remedy they might have. But the judge ruled that the action could be maintained, and, after a verdict for the plaintiffs for the amount due on their mortgage, reported the case for the determination of this court.

D. B. Gove, for the defendant.

L. Mason, for the plaintiffs.

GRAY, C. J. Upon a sale under a power contained in a mortgage of real estate, the proceeds belong to those who owned the legal title before the sale; and the mortgagee making the sale is bound, after deducting the amount of his own mortgage debt, with the costs and expenses of the sale, to pay the surplus remaining in his hands to the mortgagor or his assigns, according to their respective titles. Where the rights claimed under the mortgagor, subject to the mortgage, have been acquired by attachment and execution against him, difficulties may arise as to the form of remedy. But where those rights have been created by his conveyance, either absolute or in mortgage, the mort-

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gagee making the sale, and holding a surplus in his hands, is liable to such assigns of the mortgagor, according to their respective interests, in the ordinary action for money had and received. *Buttrick* v. *Wentworth*, 6 Allen, 79. *Varnum* v. *Meserve*, 8 Allen, 158. *Gardner* v. *Barnes*, 106 Mass. 505. *Wiggin* v. *Heywood*, 118 Mass. 514. *Cranson* v. *Ockington*, 118 Mass. 409.

The fact that the defendant, instead of selling the title mortgaged to him, subject to prior mortgages, sold the entire title in the land, does not affect the case; because that course might lawfully be, and is assumed by the report and the argument to have been, taken with the assent of the prior mortgagees, and the report shows that the fund in the defendant's hands is sufficient to pay them also. *O'Connell* v. *Kelly*, 114 Mass. 97. *Alden* v. *Wilkins*, 117 Mass. 216. *Morton* v. *Hall*, 118 Mass. 511.

Judgment on the verdict.

LEWIS A. ROBERTS *vs.* AARON W. SPENCER & others.

Suffolk. November 22. — 26, 1877. ENDICOTT & LORD, JJ., absent.

On the question whether A. knew that B. had withdrawn from a partnership before A. made a contract with it, newspapers regularly taken by A., containing statements as to the dissolution of the firm and B.'s retirement from it, are admissible; and A.'s affidavit to the proof in bankruptcy, against the other partners only, of his claim under the contract, is admissible, for the same purpose, and to contradict A.'s testimony that he supposed B. to be a member of the partnership, and relied upon him in making the contract.

Notice to a party to produce a letter, which he has testified he had not in his possession and had never received, is unnecessary as a preliminary to the introduction of a copy of the letter in evidence.

CONTRACT against the defendants as members of the firm of Spencer, Vila & Company, on two checks, dated in June, 1872, signed by the firm name, and payable to the plaintiff or order, and on an account due the plaintiff from the firm for the purchase and sale of stocks. Spencer filed an answer containing a general denial, and alleging that he was not a member of the firm at the time of the transactions in question. The other defendants pleaded their discharge in bankruptcy, and the action was

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discontinued as to them. Trial in this court, before *Soule*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff introduced evidence tending to prove that Spencer was a member of the firm from July 1, 1857, when it was formed, until after the time of the transactions in question. The plaintiff also testified that he did business with the firm prior to the summer of 1872, but did not state any instance except that on April 19, 1867, he bought a right, in writing of the firm, to buy one hundred shares of stock of the Boston Water Power Company, within a certain time, at a certain price, paying therefor $125; that he did this business with Spencer, paying by his check; and that he supposed that Spencer was a member of the firm, and relied on him in the matters in controversy.

The defendant put in evidence tending to show that he was a member of the firm when it was formed in 1857 by himself and Vila, for carrying on business as bankers and brokers; that one Farley was admitted to the firm in 1863; that this firm was dissolved on July 1, 1867, Spencer withdrawing; that Vila and Farley continued the business until 1869, when Farley withdrew and Wardwell went in, and these two continued the same business under the original firm name till they failed in the autumn of 1872; and that the plaintiff did no business with the firm prior to the alleged withdrawal of Spencer.

The defendant was permitted to put in evidence the advertisement of the dissolution of the firm and withdrawal of Spencer, published by the members of the firm in the Boston Advertiser and the Boston Post, on July 1, 1867, and an editorial article on the withdrawal of Spencer from business, published in the Boston Post on July 2, 1867. To the admission of this evidence the plaintiff objected. The plaintiff had already testified that he advertised at that time in both of these newspapers, and that they were sent regularly to his place of business.

The plaintiff testified that he did not know or hear of the withdrawal of Spencer from the firm until late in 1873. On his cross-examination, his attention was called to an affidavit of his proof in bankruptcy of the claim sued on, against the estate of Vila and Wardwell, as partners under the firm and style of Spencer, Vila & Co. The plaintiff testified that he signed the

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affidavit and made oath to it, but that he had no recollection of so doing; that the paper was not in his handwriting; and that he did not read it and did not know its contents. The defendant was permitted, against the plaintiff's objection, to read the affidavit to the jury. The plaintiff, having afterwards introduced evidence tending to show that the claim was not proved against the estate of Vila and Wardwell, as partners under the firm of Spencer, Vila & Co., the defendant called one of the assignees in bankruptcy, who testified that the claim failed of allowance merely because the vouchers were not filed, and that he gave written notice thereof to the plaintiff, by a letter put into the mail, post-paid, to his address, a duplicate of which he produced, and was permitted, against the objection of the plaintiff, to read it to the jury. No notice had been given to the plaintiff to produce the letter sent to him, but he had testified that he had not possession of it and did not receive it.

The case was submitted to the jury with full instructions, to which no exception was taken. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. Nickerson, for the plaintiff.

E. Avery, for Spencer.

By the Court. All the exceptions are to the admissibility of evidence, and none of them can be sustained. The statements published in newspapers regularly taken by the plaintiff were competent upon the question whether he knew that Spencer had withdrawn from the partnership before the contract sued on was made. The plaintiff's affidavit to the proof of his claim in bankruptcy against the other partners was admissible upon the same question, and to contradict his testimony that he supposed Spencer to be a member of the partnership, and relied upon him in making the contract. It would have been futile to give the plaintiff notice to produce a letter which he testified he had not in his possession and had never received.

Exceptions overruled.

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COMMONWEALTH *vs.* JAMES WALLACE.

Bristol. Oct. 23. — Nov. 15, 1877. LORD & SOULE, JJ., absent.

On a complaint for keeping intoxicating liquors for sale in violation of law, evidence is admissible that the defendant kept a place of business consisting of two rooms, in one of which was a counter and a few cigars with tables and chairs; that the place was one of common resort; that on being arrested at that place he tried to conceal a bottle containing intoxicating liquor in his pocket, and afterwards, while under arrest, threw it away; and that, a few days after the arrest, he made an attempt to bribe the officer who arrested him.

COMPLAINT for unlawfully keeping intoxicating liquors with intent to sell the same.

At the trial in the Superior Court, before *Rockwell*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions to the admission of certain evidence, the nature of which appears in the opinion.

E. L. Barney & H. M. Knowlton, for the defendant.

W. C. Loring, Assistant Attorney General, for the Commonwealth.

AMES, J. There was evidence to the effect that the defendant kept a place of business consisting of two rooms, in one of which was a counter and a few cigars with tables and chairs; that the place was one of common resort; that on being arrested at that place he tried to conceal a bottle containing intoxicating liquor in his pocket, and afterwards, and while under arrest, he threw it away; and that, a few days after his arrest, he made an attempt to bribe the officer who arrested him. These proceedings on his part were competent evidence against him. In most criminal cases a portion of the evidence consists of the conduct and deportment of the accused party at and after the time of the charge. Thus flight, concealment, the use of falsehoods or evasions, are all matters which the jury have a right to look upon as unfavorable and suspicious. Roscoe Crim. Ev. (7th Am. ed.) 18. The evidence admitted was all of it competent and material. Its weight and effect were for the jury to estimate, and we cannot say that it was not sufficient to justify their verdict.

Exceptions overruled.

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COMMONWEALTH *vs.* WILLIAM WALLACE.

Bristol. Oct. 23. — Nov. 15, 1877. LORD & SOULE, JJ., absent.

On a complaint for keeping intoxicating liquors for sale in violation of law, evidence that the defendant kept a public bar, provided with tumblers and a dripping pan; that the bar was resorted to at all hours of the day and evening, and at times at very late hours of the night; and that, at the time of his arrest at his place of business, three pint bottles containing intoxicating liquors were found in his pockets, is competent and will authorize a jury in finding him guilty.

COMPLAINT for unlawfully keeping intoxicating liquors with intent to sell the same.

At the trial in the Superior Court, before *Rockwell*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions to the admission and sufficiency of certain evidence, the nature of which appears in the opinion.

H. M. Knowlton, for the defendant.

W. C. Loring, Assistant Attorney General, for the Commonwealth.

AMES, J. There was evidence to the effect that the defendant kept a public bar, provided with tumblers and a dripping pan; that this bar was resorted to at all hours during the day and evening, and at times at very late hours of the night; and that upon searching the defendant's person, at the time of his arrest at his place of business, three pint bottles containing intoxicating liquors were found in his pockets. All this evidence was competent and would authorize the jury to convict. *Commonwealth* v. *Hayes*, 114 Mass. 282. *Exceptions overruled.*

COMMONWEALTH *vs.* JAMES McCLUSKEY.

Bristol. Oct. 23. — Nov. 27, 1877. LORD & SOULE, JJ., absent.

No exception lies to the refusal of a presiding judge to order separate trials upon an indictment containing two counts, each charging the keeping and maintaining of a distinct tenement for the illegal sale and illegal keeping of intoxicating liquors.

Evidence that two houses, in the first of which the defendant kept a saloon for the sale of intoxicating liquors, were in close proximity to each other; that the yard between the two was common to both, there being no division fence; that the

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porch of the second house, which opened into this yard, was only a few feet from the back door of the saloon; that there was a gate in the rear of the second house, used in common by the occupants of both houses, through which customers found their way to the saloon; that the defendant had often been seen to drive to this gate, and to carry jugs and demijohns through it into the yard; that two searches for liquors had been made, during the time in question, in the second house, at each of which liquors were found in jugs, bottles and demijohns, once in a locked closet in the porch and once in the cellar; that measures, tunnels and pumps, which had been recently used, were also found in the porch and cellar; that the owner and the occupant of the first floor of the second house had no knowledge of the liquors so found, and did not know that any were there; that the saloon, although fitted up and much used and resorted to for the illegal sale of intoxicating liquors, had many times been searched during the time in question and no liquors were found, except that on two occasions a very small quantity was found in bottles on the person of the bar-tender; and that in the saloon were found tumblers, a drainer and a number of pint and quart flasks: will warrant a jury in finding that the second house was kept for the unlawful sale or unlawful keeping of intoxicating liquors.

On an indictment on the Gen. Sts. *c.* 87, § 6, charging that a house was kept for the unlawful sale or unlawful keeping of intoxicating liquors, the same "being then and there a common nuisance," it is sufficient to prove that the liquors were kept in the house for sale, and the fact that they were so kept to be sold in another place is immaterial.

INDICTMENT on the Gen. Sts. *c.* 87, §§ 6, 7, in two counts, each count alleging that the defendant on January 1, 1877, and on divers other days between that day and the day of finding the indictment, did keep and maintain a certain tenement in New Bedford, for the illegal sale and illegal keeping of intoxicating liquors, said tenement being then and there a common nuisance.

At the trial in the Superior Court, before *Brigham*, C. J., it appeared that the two counts were for separate offences, and referred to separate buildings, and the defendant requested the judge to direct that he be tried separately upon each count. But the judge directed that the trial proceed upon both counts together.

It appeared in evidence that the tenement referred to in the first count was the lower floor of a building No. 4 Pearl Street, which was fitted up as a saloon for the sale of liquor, with a bar and other paraphernalia of the trade; and that this saloon, so fitted up, was used and much resorted to for the illegal sale and keeping of intoxicating liquors, the defendant being concerned in keeping the same during the time covered by the indictment.

The tenement referred to in the second count was a building on the corner of Third Street and Pearl Street, and the evidence

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on that count was as follows: The building itself was a house occupied by three families, and was on the same side of Pearl Street as, and the next house east from, No. 4. A porch extended westerly from the corner house to within a few feet of No. 4; the door of the porch being about twelve or fifteen feet distant from the back door of No. 4, which back door opened directly into the yard from the bar-room.

There was no fence between the two buildings, the yard was common to both, and there was no fence upon Pearl Street. On the Third Street side was a gate in the rear of the corner house, which gate was used in common by the occupants of both houses. Two witnesses testified to a sale of liquor in No. 4, which they entered by this gate on Third Street through this back door. There were two seizures of liquors made, during the time covered by the indictment, by the police of the city, upon search-warrants, in the corner building. The first was of a considerable quantity of various kinds of liquors contained in jugs, bottles and demijohns from a closet in the porch; and the other, some time afterwards, of a variety of liquors, contained in six jugs, from a room in the cellar. The door leading from the yard into the porch was on each occasion found unlocked; but the closet was locked and was broken open by the officers. The cellar was under the main building and was reached by a door from the porch, which was not locked, but the room in the cellar was locked and was broken open by the officers. In the room in the cellar were also found a hand pump, and half pint, pint and quart measures, and tunnels, which had been recently used. The porch contained a pump and implements for washing, such as a bench and tubs, &c., and nothing more; and the closet, which was about four feet square in a corner of this porch, contained nothing but the liquors found. The porch communicated with the cellar, with the main part of the house, and with the second story, but not with the third story.

One France, who owned the building and lived in the second story, testified that she let the first floor to one Mathews, and that all the families in the house had the privilege of the porch for water and for washing; and that she knew nothing whatever of any liquor found in the porch; and did not know any was there; she was not inquired of relative to the cellar or the

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liquor found there. Mathews testified that he hired the first floor with the privilege of the porch, and the privilege of using a room for storage of wood and coal in the cellar when the liquors were found; that he had such a room kept locked, having fuel in it, but no liquors; that the room in the cellar in which the liquors were found had no fuel in it, and was locked, and that it was not the same room used by him; that the porch was never locked, and was common to the whole house, and the pump in it was much visited by all the neighbors; and that he knew nothing whatever of any liquors found in the porch or in the cellar, and did not know any were there. No other occupant of the house was called to testify in relation to the matter. Several officers testified that they had seen the defendant drive up to the gate on Third Street many times, and take from the wagon and carry into the gate jugs, and sometimes demijohns, but whether he carried them into the corner house or into house No. 4, they could not say in any case, the back doors of the two houses not being visible to them.

There was no evidence that the defendant, or any one for him, had ever been in the corner building or porch; or had ever been seen going in or coming out from there; but all the witnesses for the government testified that they had never seen him in the building nor going in nor coming out from the same, except as they had seen him going in and coming out of the gate. It appeared that the defendant lived and boarded with one Smith, who occupied the upper story of the building No. 4 Pearl Street.

There was evidence that officers had many times, during the period covered by the indictment, searched the saloon in building No. 4, but with the exception of two occasions they found no intoxicating liquors whatever; that on those two occasions they only found a very small quantity in bottles on the person of the bar-tender; and that on said several searches, tumblers of different kinds, a tumbler drainer, and in a closet behind the bar a number of new pint and quart glass flasks were found. No search was made in the upper story of No. 4 excepting once, and then no liquor was found.

The above was all the evidence in relation to the second count and the defendant asked the judge to rule that there was no evidence upon which the jury could be authorized to convict the defendant upon that count.

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The defendant also requested the judge to rule that the evidence in relation to the finding of liquors in the corner building was not admissible in support of the first count. The attorney for the government contended, upon all the evidence in the case, that the bar-room in No. 4 Pearl Street was used for the sale of liquors, which were kept stored in the locked apartments in the corner house, and that the liquors found in those apartments were intended for the supply of the room in No. 4.

The judge refused both requests, and ruled that there was evidence upon which the defendant could be convicted upon the second count; that the evidence in relation to the finding of the liquors in the corner building was admissible in support of the first count, and further instructed the jury as follows:

"If the defendant, within the time alleged in the indictment, kept tenements of one or more rooms in each of two buildings, independent of and detached from each other, evidence that in the tenement in one of these buildings was kept a store of intoxicating liquors, from which such liquors were supplied to his tenement in the other of these buildings, which was used by him for the illegal sale or the illegal keeping of the liquors thus supplied, may be considered by the jury to explain the fact that upon searching the tenement thus used no intoxicating liquors were found there, or a smaller quantity of intoxicating liquors was found there, in connection with the fixtures and arrangements of a bar-room, than might be reasonably expected in a place used for the illegal sale or illegal keeping of intoxicating liquors. If the defendant during the time covered by the indictment kept tenements of one or more rooms in each of two buildings, independent of and detached from one another, and one of said tenements was used for the illegal keeping and for the illegal sale of intoxicating liquors kept for illegal sale there, or kept for supplying liquor to, and for illegal sale and illegal keeping in a bar-room in the first named tenement, in which a very small quantity of intoxicating liquors were usually kept, the defendant may be convicted upon the two counts of the indictment, for keeping each of the tenements, which such counts severally describe."

The jury returned a verdict of guilty upon both counts; and the defendant alleged exceptions.

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H. M. Knowlton, for the defendant.

W. C. Loring, Assistant Attorney General, for the Commonwealth.

AMES, J. It was proved at the trial that the defendant kept a saloon for the sale of intoxicating liquors in the building described as No. 4, and it is conceded that he was properly convicted of the charge contained in the first count. To convict him upon the second, it was necessary to prove that the liquors found in the other building were kept by him for illegal sale. In that case it would be immaterial that they were not intended to be sold in the building where they were found. *Commonwealth* v. *Intoxicating Liquors*, 116 Mass. 24. *Commonwealth* v. *Intoxicating Liquors*, 116 Mass. 27. Both the place of deposit and the place of actual sale would be embraced in the description of common nuisances, as given in Gen. Sts. *c.* 87, § 6.

No exception lies to the refusal to order a separate trial upon each count. It was competent for the judge to confine the trial to a single count, if he thought proper, but this is left entirely to his discretion. *Carlton* v. *Commonwealth*, 5 Met. 532. *Commonwealth* v. *Cain*, 102 Mass. 487.

With regard to the sufficiency of the evidence applicable to the second count, it appeared that the two buildings were in close proximity with each other; that the yard between the two was common to both, there being no division fence; and that the porch which opened into this yard was only a few feet from the back door of the saloon. There was a gate in the rear of the corner house, used in common by the occupants of both houses, and through which customers found their way to the saloon. The defendant had often been seen to drive to this gate, and to carry jugs and demijohns through it and into the yard. Two searches for liquors had been made, during the time covered by the indictment, in the corner house, and each time liquors were found, once in a locked closet in the porch and once in the cellar, contained in jugs, bottles and demijohns. Measures, tunnels and pumps were also found, which had been recently used, in the porch and the cellar. The owner of the corner building, and the occupant of the first floor, were called as witnesses, and testified that they had no knowledge of the liquors so found, and did not know that any were there. Also there was evidence

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that the saloon, although fitted up and much used and resorted to for the illegal sale of intoxicating liquors, had many times been searched by the police during the time covered by the indictment, without finding any such liquors whatever, except that on two occasions a very small quantity had been found, in bottles, on the person of the bar-tender. At the saloon they found tumblers, a drainer and a number of pint and quart flasks, but usually no liquors, and never what could be called a stock or supply of liquors, for such an establishment, "much used and resorted to." Under these circumstances, and in the absence of any explanation from the defendant, we cannot say that the jury might not have inferred that the jugs and demijohns found in the corner building, and containing intoxicating liquors, were those which the defendant had been seen to carry through the gate, and that they were kept by him in that building to supply his saloon. We therefore see no error in the rulings and instructions of the presiding judge. *Exceptions overruled.*

COMMONWEALTH *vs.* JEREMIAH DESMOND.

Essex. November 7. — 8, 1877. MORTON & SOULE, JJ., absent.

The rules, relating to the construction of repealing statutes, enacted by the St. of 1869, c. 410, are to be deemed part of every repealing statute since passed, as much as if expressly inserted therein, unless the later statute clearly manifests a different intention.

INDICTMENT on the St. of 1874, *c.* 356, for illegal voting, found by the grand jury empanelled at January term 1876 of the Superior Court. After a verdict of guilty, the defendant, at January term 1877, moved in arrest of judgment, for the reason that "the statute, under which the indictment was framed, was repealed by the St. of 1876, *c.* 172," passed April 26, 1876.

The motion was overruled; and the defendant alleged exceptions.

C. A. Benjamin, for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

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GRAY, C. J. By the St. of 1869, *c.* 410, entitled "an act to establish certain rules for the construction of repealing statutes," it is enacted that "in the construction of all statutes hereafter enacted the following rules shall be observed, unless such construction would be repugnant to the express terms of the same statute." The general rules so established are to be deemed part of every repealing statute since passed, as much as if expressly inserted therein, unless the later statute clearly manifests a different intention. One of these rules is that the repeal of an act shall not affect any prosecution pending at the time of the repeal for an offence committed under the act repealed. The St. of 1876, *c.* 172, § 4, which simply enacts that the St. of 1874, *c.* 356, "is hereby repealed," does not therefore affect this prosecution, which was pending under the St. of 1874 when the St. of 1876 was passed. *Exceptions overruled.*

COMMONWEALTH *vs.* JOHN FITZGERALD.

Essex. November 7. — 8, 1877. MORTON & SOULE, JJ., absent.

On an indictment for an assault with intent to ravish, the person assaulted testified that the defendant assaulted her; that she knew where he lived; and that during the same week she made complaint to the officer who made the arrest. The government offered evidence of what she told the officer at that time, which, upon the defendant's objection, was excluded. The defendant, for the purpose of showing that she did not tell the officer that he was the man who assaulted her, offered to prove that, up to his arrest, he was generally at his home, and that no effort was made to arrest him until a week after the alleged assault. The defendant still objecting to the evidence offered by the government which had been excluded, the judge declined to admit the evidence offered by the defendant. *Held*, that the defendant had no ground of exception.

INDICTMENT for an assault in Lawrence, upon Lizzie F. Hill, with intent to ravish.

At the trial in the Superior Court, before *Wilkinson*, J., Hill testified that the defendant made the assault upon her, on December 12, 1876, about midnight, while she was on her way home unattended; that for a year previously she had known the defendant, and, at the time of the assault knew where he

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lived; that on some day after the assault, but in the same week, she made complaint to the officer at the head of the Lawrence police force, who afterwards made the arrest. The government offered to prove what she said to the officer at the time she made complaint to him, but, upon the defendant's objection, the judge excluded the evidence.

It appeared in evidence that the defendant was not arrested until December 19, 1876, and the only question submitted by the defendant was the question of identity. For the purpose of showing that Hill did not tell the officer that the defendant was the man who assaulted her, the defendant offered to prove that, from the date of the assault to the time of his arrest, he was, during a greater portion of the time, at his home in Lawrence, where he could easily have been found, and that no effort was made to secure his arrest until December 19. This evidence being objected to, the judge asked the defendant if he still objected to the offer of evidence made by the government and excluded as aforesaid, and, being answered in the affirmative, the judge rejected this offer of evidence by the defendant.

The jury returned a verdict of guilty; and the defendant, alleged exceptions.

E. T. Burley, for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

By the Court. The defendant has no ground of exception to the exclusion of the evidence offered by him. It had no tendency to prove that the witness Hill did not tell the officer that the defendant was the man who assaulted her, which was the only purpose for which it was offered. And evidence of what she told the officer had already been excluded, when offered by the Commonwealth, upon the defendant's objection.

Exceptions overruled

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COMMONWEALTH *vs.* ORLANDO BROWN.

Essex. November 7. — 28, 1877. MORTON & SOULE, JJ., absent.

Where terms of a police court are by law to be held daily for the transaction of criminal business, and on the first and third Wednesdays of each month for civil business, and the record in a criminal case shows that it was heard and adjudged in that court on the second Wednesday of a month, but fails to set forth that the proceedings were had "at a criminal term" of the court, it will be presumed that the court was then engaged in the transaction of criminal business, and a motion in arrest of judgment must be overruled.

COMPLAINT to the Police Court of Haverhill for keeping and maintaining a certain tenement in Haverhill, for the illegal sale and illegal keeping of intoxicating liquors, the same being a common nuisance. The record, transmitted to the Superior Court on appeal, was as follows:

"Commonwealth of Massachusetts. Essex, ss. By virtue of the within warrant, the respondent is brought before the Police Court of Haverhill, in said county of Essex, this ninth day of May, A. D. 1877, and the within complaint is read to him, and being asked whether he is guilty or not guilty of the offence within charged upon him says that he is not guilty; but after hearing divers witnesses duly sworn to testify the truth, the whole truth, and nothing but the truth, and fully understanding the defence of said defendant, it is adjudged by the said court that said defendant is guilty of said offence. It is therefore ordered by said court that the said defendant pay a fine of fifty dollars and costs of this prosecution; and, in default of payment, that he be committed to either house of correction in said county for the term of sixty days, and that he be committed to either house of correction aforesaid for the further term of three months."

The record further stated that the defendant appealed to the Superior Court for the county of Essex, and recognized to prosecute his appeal.

In the Superior Court, after a verdict of guilty, the defendant moved in arrest of judgment, "because it does not appear from the record that the complaint was heard and adjudged at a criminal term of the Police Court of Haverhill, or at a term of said court held for the transaction of criminal business, which fact

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should appear to give either the court below or this court jurisdiction in the premises." *Pitman*, J., overruled the motion; and the defendant alleged exceptions.

E. F. Stone, for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

ENDICOTT, J. The St. of 1869, *c.* 385, provides that police courts shall be held for the transaction of criminal business daily; and the St. of 1877, *c.* 74, provides that the Police Court of Haverhill shall be held for civil business on the first and third Wednesdays of each month, and on such other days as the justice shall determine. It appears by the record that this case was tried May 9, 1877, (which was Wednesday,) before the Police Court of Haverhill. A court was required by law to be held on that day for criminal business. It is to be presumed that such a court was held in obedience to the requirement; and as this case was within the jurisdiction of such a court, and as the record recites that it was heard and adjudged in the Police Court of Haverhill on that day, it is to be presumed that it was then engaged in the transaction of criminal business. It was tried at a time when the court should have been, and we presume was, in session for that purpose. *Exceptions overruled.*

COMMONWEALTH *vs.* CHARLES CARROLL.

Suffolk. November 26. — 28, 1877. COLT & LORD, JJ., absent.

On an indictment for the larceny of certain wool alleged to belong to A., there was evidence that A. had certain wool stored in a building, of which a portion, exceeding in quantity that set forth in the indictment, was missing; that the defendant admitted that he took the wool, described in the indictment, from a hall adjoining the rooms in which A.'s wool was stored, but said that he bought it of the occupant of the hall, which the latter denied; that the defendant attempted to procure a witness to testify falsely that the occupant of the hall hired him to remove the wool; that the defendant hired a man and wagon to take the wool, but remained away while it was being loaded, and joined the wagon soon after it had started with its load; that the hall was not in constant use, and there was opportunity to remove the wool from the storeroom and repack it in smaller bags, as when taken. It did not appear that there was any wool other than A.'s stored in the building at the time of the alleged larceny; and there was no evidence that other

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wool, stolen at about the same time from a wharf in the neighborhood, had been placed in the hall or building. *Held*, that the evidence would warrant a finding that the wool in question was the property of A.

INDICTMENT for the larceny, on August 1, 1875, of 623 pounds of wool, the property of John G. Wright, in a storehouse, the property of John Worster.

At the trial in the Superior Court, before *Dewey*, J., Wright, the alleged owner of the wool, testified that in August, 1875, he had stored in the storerooms of John Worster a large quantity of wool; that about two months before the trial (which was at April term 1877) he discovered that about 4000 pounds of this wool were missing; that the wool was contained in bags or bales of 200 pounds' weight each; and that he had no wool stored in the hall of Edward Malone, nor knowledge of any wool being in that hall.

It was also in evidence that the building, in which Wright's wool was stored, was occupied on the first story by Edward Malone as a saloon; that the second story contained the hall of Malone above referred to, and the storerooms of Worster; that there were other tenants in the third and fourth stories of the building; that the second story, along which ran a passageway, was reached by a flight of stairs leading from the street; that on one side of the passageway was one storeroom of Worster, and on the other side the hall of Malone, and another storeroom of Worster in the rear of the hall; that the wool described in the indictment was in Malone's hall, when taken from the building, but there was no evidence as to how it came there nor from whence it came; that it was in small bags of about fifty pounds' weight each; and that other wool had been stolen from a neighboring wharf about the time this wool was alleged to have been stolen. There was no other evidence as to the ownership of the wool described in the indictment. There was also evidence that the passageway that led both to the door of the storeroom where the wool was stored, and to the door of the hall, was open and used by the occupants of the third and fourth stories; that the defendant, while admitting that he removed the wool from the hall and sold it, said he purchased it from Malone, but Malone denied this; that the defendant attempted to procure a witness to testify falsely to Malone's having hired him to help remove

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the wool from the hall and load it on a wagon; that he hired a man and wagon to take the wool, but remained away while the wool was being loaded, and joined the wagon soon after it had started with its load; and that the hall was only in occasional use.

The government contended that the wool was taken from the storeroom into the hall and repacked, preparatory to its removal from the building, but offered no evidence on that point. The defendant requested the judge to instruct the jury that this evidence was insufficient in law to warrant them in finding that the wool described in the indictment was the property of Wright; but the judge declined so to rule, and instructed the jury that it was for them to say, on this evidence, whether or not the wool so described was the property of Wright. The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. W. Doherty, for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

ENDICOTT, J. There was evidence from which the jury might properly find that the wool in question was the property of Wright. He had a large amount stored in the building, and a portion, exceeding in quantity that set forth in the indictment, was missing. It does not appear that there was any other wool stored in the building at the time of the alleged larceny. The prisoner admitted that he took the wool described in the indictment from a hall adjoining the rooms in which Wright's wool was stored, and said that he bought it of Malone, the occupant of the hall. This Malone denied; and there was evidence that the prisoner attempted to procure a witness to testify falsely that Malone hired him to remove the wool. The conduct of the prisoner at the time the wool was taken away was also in evidence. The hall was not in constant use, and there was opportunity for the prisoner to remove the wool from the storeroom and repack it in smaller bags; and there was no evidence tending to show that other wool, stolen about the same time from a wharf in the neighborhood, had been placed in the hall or building. The case was properly submitted to the jury.

Exceptions overruled.

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COMMONWEALTH *vs.* BERNARD F. TRAINOR.

Norfolk. November 26. — 28, 1877. AMES & LORD, JJ., absent.

On a complaint for selling intoxicating liquor, it is a sufficient statement of the name of the person, to whom the liquor is alleged to be sold, if the name, by which he was generally known at the time of the sale, is given, although he was baptized by a different name.

If, on a complaint for selling intoxicating liquor, the person to whom the liquor is alleged to have been sold, and who testifies to the sale, admits that he went to the defendant's place of business for the purpose of procuring evidence against him, and was paid for it, the defendant has no ground of exception to the refusal of the judge to give an instruction that the evidence of such person should be considered with great care, or to the giving of an instruction that in considering his testimony the jury should have regard to what appeared in the evidence, as to the part he had taken, that when a witness has by words or acts manifested a feeling adverse to the defendant, or, for any cause, might be affected by prejudice, the jury should consider and weigh these facts, and make reasonable allowance therefor, in considering his testimony.

COMPLAINT under the St. of 1875, *c.* 99, charging the defendant with a single sale of intoxicating liquor to "Andrew D Rooney."

At the trial in the Superior Court, before *Dewey*, J., Rooney testified that his name was Andrew D. Rooney, but, upon cross-examination, that he was baptized by the name of Andrew Rooney; that he was known by that name, and none other, until he arrived at the age of ten years, when he was about to be confirmed in the Roman Catholic Church; that he then told a priest of that church that his name was Andrew Daniel Rooney, and he was confirmed by the bishop by this last name; that, since the time of his confirmation, he sometimes gave and wrote his name as Andrew Rooney, and at other times Andrew D. Rooney, but thought he used and wrote his name as Andrew Rooney as frequently as Andrew D. Rooney; that he changed his name by no process of law, nor by leave of any court. Rooney also testified, that he went to the defendant's place of business for purpose of obtaining evidence against him, and that he received seventy-five cents for that purpose.

The defendant requested the judge to rule as follows: "1. A mistake in the name of the person to whom the alleged sale was made is a fatal variance. 2. Rooney should be described in the

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complaint by his true christian name, which is Andrew, and not Andrew D. A fictitious christian name is not sufficient. 3. The christian name is that part of one's name which precedes the surname, and it is the name given at the time of baptism. 4. Rooney inserted the letter D. between his surname and his christian name without any legal right or authority whatever, and consequently is not described in the complaint by his true christian name, as the law requires. 5. After a person is christened and baptized by a name, and he adopts and becomes known by that name, and none other, the name by which he was so christened and baptized and known is his true christian name. 6. A person can change no part of his true name only by due process of law. 7. There is a fatal variance between the allegations in the complaint and the evidence as to the true name of the person to whom the alleged sale was made. 8. The testimony of Rooney should be considered with great care by the jury."

The judge gave the first instruction requested, but declined to give the others, and instructed the jury as follows: "A mistake in the name of the person to whom the alleged sale was made is a material and fatal variance. Rooney should be described in the complaint by the name by which he was generally known at the time of the sale alleged in the complaint; the name which was given to him at the time he was baptized is to be taken as originally, and presumed to continue, his name; but if after his baptism he adopts and uses another name by which he is subsequently well known in the community where he resides, prior to and at the time of the alleged sale, it is sufficient if he is described by that name in the complaint. In considering Rooney's testimony, the jury are to have regard to what appears in the evidence, as to the part he had taken in connection with the case. When a witness has by words or acts manifested an intent or feeling adverse to the defendant in any case, or for any cause might be affected by prejudice or bias, the jury should consider and weigh these facts, and make reasonable allowance therefor in considering his testimony."

The jury returned a verdict of guilty, and the defendant alleged exceptions.

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J. E. Cotter, for the defendant.
C. R. Train, Attorney General, for the Commonwealth.
THE COURT *Overruled the exceptions.*

COMMONWEALTH *vs.* EDWARD HART.

Middlesex. November 26. — 28, 1877. COLT & LORD, JJ., absent.

An objection to the form of a warrant, issued for the arrest of an accused person and his appearance before a district court, if it could ever have availed him, is waived by his omission to take it in that court, and cannot be taken, for the first time, in the Superior Court on appeal.

COMPLAINT on the Gen. Sts. *c.* 87, §§ 6, 7, made and sworn to by William W. Pratt before a justice of the peace on December 1, 1876, and charging the defendant in due and usual form with unlawfully keeping and maintaining a common nuisance, to wit, a tenement used for the illegal keeping and illegal sale of intoxicating liquors, at Stoneham, "on the first day of July in the year of our Lord one thousand eight hundred and seventy-six, and on divers other days and times between that day and the day of making this complaint."

The justice of the peace thereupon issued a warrant commanding the officers to whom it was addressed to arrest the defendant and bring him before the First District Court of Eastern Middlesex to answer to the Commonwealth on the complaint "this day made on oath before me, wherein said William W. Pratt complains that the said Edward Hart, at Stoneham, in the county of Middlesex, on the first day of December current, unlawfully did keep and maintain a common nuisance, against the peace of the Commonwealth and the form of the statute in such case made and provided."

In the District Court, the defendant moved to quash the complaint as defective and insufficient. That motion was overruled, and the defendant was tried and convicted, and appealed to the Superior Court; and there moved to quash the proceedings, "because the warrant does not set forth the substance of the accusation as required by law." *Putnam*, J., overruled this motion. The defendant then pleaded guilty; and alleged exceptions.

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A. V. Lynde, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. The objections to the complaint were not relied on in argument. The objection to the form of the warrant, if it could ever have availed the defendant, was waived by his omission to take it in the District Court, and could not be first made in the Superior Court. *Commonwealth* v. *Henry*, 7 Cush. 512. *Exceptions overruled*

Commonwealth *vs.* John Kelly.

Middlesex. November 26. — 28, 1877. Colt & Lord, JJ., absent.

In an indictment alleging that "the jurors for the Commonwealth of Massachusetts" present that the defendant at a certain trial before "a certain jury of the country" falsely testified upon a material question, "and so the jurors aforesaid" do say that the defendant committed perjury, the words "the jurors aforesaid" refer to "the jurors of the Commonwealth of Massachusetts," and not to "a certain jury of the country."

Indictment for perjury, alleging that "the jurors for the Commonwealth of Massachusetts on their oath present" that, at October term 1876 of the Superior Court, a certain issue in due manner joined in that court between said Commonwealth and the defendant, upon a certain indictment, came on to be tried, and was then and there in due form of law tried by "a certain jury of the country," in due manner returned; and that at and upon the trial of the said issue, the defendant was produced as a witness and was then and there duly sworn, and the defendant being so sworn as aforesaid, it then and there became and was a material question whether the defendant or one Parmenter did strike one McGlone; that "the jurors aforesaid, on their oath aforesaid, do further present" that then and there on the trial aforesaid the defendant falsely gave evidence to the said "court and jury" that not he but Parmenter struck McGlone, whereas, in truth and fact, the defendant did strike said McGlone and Parmenter did not; "and so the jurors aforesaid, on their oath aforesaid," do say that the defendant did then and there commit wilful and corrupt perjury.

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In the Superior Court, before the jury were empanelled, the defendant filed a motion to quash the indictment on the ground "that there are two separate and distinct sets of jurors mentioned and described in said indictment, and it does not clearly, sufficiently or distinctly appear which jurors mentioned therein returned said indictment."

Putnam, J., overruled the motion, and the defendant was then tried. The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. R. Morse, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. By the strictest construction of the indictment, as well as in the evident intent of the pleader, the words "the jurors aforesaid" refer to "the jurors for the Commonwealth of Massachusetts," by whom the indictment is presented, and not to "a certain jury of the country," before whom the defendant is alleged to have committed perjury.

Exceptions overruled.

Commonwealth *vs.* Robert Scott & another.

Hampshire. Nov. 27. — Dec. 8, 1877. Endicott & Lord, JJ., absent.

In a criminal case tried in the Superior Court, and in which exceptions alleged at the trial have been entered in and overruled by this court, and a rescript sent down accordingly, a motion for a new trial, on grounds not affecting the correctness of the decision upon the exceptions, cannot be made in this court.

Gray, C. J. At June term 1877 of the Superior Court for criminal business for the county of Hampshire, the defendants were tried and convicted of breaking and entering the Northampton Bank with intent to steal therein, and alleged exceptions to the rulings and instructions at the trial, which were allowed by the presiding judge, and were entered at September term of this court for that county, and, upon the adjournment of that term without day, were continued *nisi* for argument and decision, and by consent of counsel were argued at October term in Worcester, and were afterwards overruled, and on October 19, 1877, a rescript was sent to the Superior Court accordingly, and

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was entered upon the next day on the docket of that court. *Commonwealth* v. *Scott*, *ante*, 222.

On November 16, 1877, the defendants filed, in the office of the clerk of this court for the county of Hampshire, a motion for a new trial, upon grounds relating to the conduct of the presiding judge, the counsel and the witnesses at the trial, and for newly discovered evidence. Upon this motion being brought to the notice of the full court sitting in Suffolk, a doubt was expressed whether it could be made in this court; and it was agreed that the question whether the motion could be entertained, either by the full court or by a justice thereof, should be argued before the full court, and that, if the question should have been formally reserved by a single justice, it should be treated as so reserved, and proper entries made upon the docket.

The question has now been argued, and upon consideration thereof we are of opinion that the motion cannot be entertained. A motion for a new trial must be made in the court which has at the time jurisdiction of the case. Both this court and the Superior Court have power to grant new trials in cases pending before them respectively. Gen. Sts. *c.* 115, § 6; *c.* 129, § 67; *c.* 173, § 7. *Commonwealth* v. *McElhaney*, 111 Mass. 439. *Borrowscale* v. *Bosworth*, 98 Mass. 34. Under former statutes, by which an appeal, a bill of exceptions or a report transferred the whole case, it was within the power of this court, while the case remained here, to entertain a motion for a new trial for any cause; but it was not its practice to decide such a motion, when it might be heard in the court below. *Commonwealth* v. *Peck*, 1 Met. 428.

Under the existing statutes, the appeal, bill of exceptions or report does not transfer to this court the whole case, but only the question of law to be revised, unless the court, upon deciding that question, sees fit to give further directions, or to order that the record of the whole case be brought to this court for trial or other disposition thereof. Gen. Sts. *c.* 112, §§ 11, 35; *c.* 114, §§ 10–12, 14; *c.* 115, §§ 6, 7, 12. Sts. 1864, *c.* 111; 1866, *c.* 220; 1869, *c.* 438; 1874, *c.* 248, § 2. So much of the Gen. Sts. *c.* 173, §§ 8–10, reënacting provisions of earlier statutes, as might seem, taken by itself, to be susceptible of a broader construction, is controlled and limited by the clear enactments of

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the statutes just referred to, establishing a uniform system. See *Commonwealth* v. *Field*, 11 Allen, 488, 498, 499.

It follows that, after the exceptions taken at the trial of this case had been overruled, and a rescript sent down by this court, and entered in the Superior Court, disposing of those exceptions, being the only matter in the case which had ever been brought before this court, such a motion as that now presented, depending wholly upon questions of discretion, and suggesting no error in the decision upon the exceptions, cannot be made in this court, but can only be made in the Superior Court, which has entire and exclusive jurisdiction of the case.

To extend to this case, as contended by the learned counsel for the defendants, the provision of the Gen. Sts. *c.* 112, § 3, declaring that this court "shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein, where no other remedy is expressly provided," would be to disregard the very words of that provision, and to assume a burden, which it would be impossible to discharge, of revising all questions of fact or of discretion which the Legislature has wisely committed to the final determination of the inferior courts established for the purpose.

Motion denied.

H. H. Bond, for the defendants.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

COMMONWEALTH *vs.* JOHN NEWTON.

Middlesex. Nov. 26. — Dec. 7, 1877. COLT & LORD, JJ., absent.

An officer, acting under a warrant authorizing him to enter a building described as occupied by A., but in fact occupied by A. and B. in separate tenements, and seize and remove liquors kept there by A. for sale in violation of law, has no right to enter and search a closet which is a part of B.'s tenement, and is not used by A. as a place of keeping liquors, although he believes that the closet is in A.'s occupation; and B. may resist his entry, using reasonable force.

INDICTMENT alleging that the defendant assaulted George W Rigby, a police officer, and unlawfully obstructed him in the execution of the duties of his office.

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At the trial in the Superior Court, before *Pitman*, J., it appeared that a search-warrant was issued to Rigby, reciting belief and reason to believe that certain intoxicating liquors were kept and deposited by Michael Conners in a certain building "occupied by said Michael Conners as a dwelling-house, a shop and a place of common resort being kept therein," which liquors were intended by Conners for sale in violation of law, and requiring him to enter the building, and search for and seize the liquors.

The building was occupied, as Rigby knew, in part by Conners and in part by the defendant, in separate tenements. Rigby, having his warrant, entered that part of the building occupied by Conners, and was proceeding to enter a certain closet or apartment, which opened by a door into Conners's tenement, and also by another door into the defendant's tenement, when his entry was opposed by the defendant, and the alleged assault committed.

The defendant offered evidence tending to show that the closet or apartment was in his exclusive occupation and control, and that Conners had no interest or rights therein, or access thereto, or intoxicating liquors or other property therein; but the judge refused to admit the evidence.

The defendant requested the judge to instruct the jury that Rigby, under his warrant, had no authority to enter the premises of the defendant and remove any property of his, and that the defendant had a right to use all necessary and reasonable force, under the circumstances, to prevent him from so doing. The judge refused so to rule, and instructed the jury that the warrant, under which Rigby acted, was sufficient to authorize him to enter the closet for search, if he believed the closet was in the occupation of Conners; that he was not bound under this warrant to decide correctly at his peril the actual fact of occupancy; and that the defendant had no right to oppose him.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. B. Goodrich, for the defendant.

C. R. Train, Attorney General, for the Commonwealth, submitted the case without argument.

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MORTON, J. The search-warrant in this case authorized the officer to enter and search the house occupied by Michael Conners. It did not justify him in entering the tenement occupied by the defendant. If, therefore, the closet, which the officer insisted upon searching, was in fact a part of the defendant's tenement, and was not used by Conners as a place of keeping intoxicating liquors, the officer had no right to enter it, and the defendant had the right to resist his entry, using reasonable force. The fact that the officer believed that the closet was in the occupation of Conners cannot affect the rights of the defendant.

The case differs from *Commonwealth* v. *Leddy*, 105 Mass. 381, because in that case the apartment searched by the officer was occupied by Galligan, the person charged in the complaint and warrant, for the illegal keeping of intoxicating liquors, by the consent of the defendant. This apartment, therefore, was a part of the tenement occupied by Galligan, and the search-warrant included it. *Exceptions sustained*

COMMONWEALTH *vs.* LUCY ANN MINK.

Middlesex. Nov. 26.—Dec. 10, 1877. COLT & LORD, JJ., absent.

By the law of this Commonwealth, suicide is deemed criminal as *malum in se*, and although an attempt to commit it is not punishable, yet a person who, in attempting to commit it, accidentally kills another who is trying to prevent its accomplishment, is guilty of criminal homicide.

INDICTMENT for the murder of Charles Ricker at Lowell, in the county of Middlesex, on August 31, 1876. Trial before *Ames* and *Morton*, JJ., who allowed a bill of exceptions in substance as follows:

It was proved that Charles Ricker came to his death by a shot from a pistol in the hand of the defendant. The defendant introduced evidence tending to show that she had been engaged to be married to Ricker; that an interview was had between them at her room, in the course of which he expressed his intention to break off the engagement and abandon her entirely that she thereupon went to her trunk, took a pistol from it, and

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attempted to use it upon herself, with the intention of taking her own life; that Ricker then seized her to prevent her from accomplishing that purpose, and a struggle ensued between them; and that in the struggle the pistol was accidentally discharged, and in that way the fatal wound inflicted upon him.

The jury were instructed on this point as follows: "If you believe the defendant's story, and that she did put the pistol to her head with the intention of committing suicide, she was about to do a criminal and unlawful act, and that which she had no right to do. It is true, undoubtedly, that suicide cannot be punished by any proceeding of the courts, for the reason that the person who kills himself has placed himself beyond the reach of justice, and nothing can be done. But the law, nevertheless, recognizes suicide as a criminal act, and the attempt at suicide is also criminal. It would be the duty of any bystander who saw such an attempt about to be made, as a matter of mere humanity, to interfere and try to prevent it. And the rule is, that if a homicide is produced by the doing of an unlawful act, although the killing was the last thing that the person about to do it had in his mind, it would be an unlawful killing, and the person would incur the responsibility which attaches to the crime of manslaughter.

"Then you are to inquire, among other things, and if you reach that part of the case, Did this woman attempt to commit suicide in the presence of Ricker? and, if she did, I shall have to instruct you that he would have a right to interfere and try to prevent it by force. He would have a perfect right, and I think I might go further and say that it would be his duty, to take the pistol away from her if he possibly could, and to use force for that purpose. If then, in the course of the struggle on his part to get possession of the pistol to prevent the person from committing suicide, the pistol went off accidentally, and he lost his life in that way, it would be a case of manslaughter, and it would not be one of those accidents which would excuse the defendant from being held criminally accountable.

"Did she get into such a condition of despondency and disappointment that she was trying to commit suicide, and was about to do so? If that was her condition, if she was making that attempt, and he interfered to prevent it and got injured by an

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accidental discharge of the pistol, it would be manslaughter." The jury returned a verdict of guilty of manslaughter; and the defendant alleged exceptions.

W. B. Gale, for the defendant. To support the instructions given in this case, it is not enough that the attempt to commit suicide should be only sinful, wicked and morally wrong, but it must be criminal and unlawful in a legal sense; it must be an offence, a crime, known to the law and punishable thereby. *Regina* v. *Packard*, Car. & M. 236. By the common law, the killing one's self was a felonious homicide, and, it not being possible to punish the offender directly, he was made to suffer the penalty in his reputation and his estate. But the whole subject of crimes and their punishment has been revised by the Legislature of the Commonwealth, and consequently the common law in reference thereto has been repealed by implication. *Commonwealth* v. *Cooley*, 10 Pick. 37. *Commonwealth* v. *Marshall*, 11 Pick. 350. *Lakin* v. *Lakin*, 2 Allen, 45. *Commonwealth* v. *Dennis*, 105 Mass. 162. Gen. Sts. *c.* 168, § 8.

It therefore follows that the attempt to commit suicide is not a crime or an offence known to and recognized by the law in this Commonwealth, unless the statutes, which by implication have repealed the common law, have so mentioned it and provided a punishment for it. But it is decided in *Commonwealth* v. *Dennis*, 105 Mass. 162, that the attempt to commit suicide is not indictable or punishable in this Commonwealth. An act cannot be criminal or unlawful in a legal sense unless it constitutes an offence which subjects the person who commits it to legal punishment therefor, nor can it be said to be recognized by the law as criminal. As there is no law in force in this Commonwealth, either statute or common, which in any manner, even by implication, recognizes the attempt at suicide as criminal or unlawful, or prohibits or provides any punishment for it, it is not criminal or unlawful, but only sinful, or morally wrong; the court erred in basing its instructions on the ground that the defendant was committing a criminal and unlawful act.

If the attempt to commit suicide by the defendant was criminal and unlawful, then it is admitted that the deceased had a moral and legal right to interfere in a proper manner and with sufficient force, and if, in such effort to restrain her, he was acci-

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dentally killed, the defendant would be criminally liable; if, however, the attempt of the defendant to commit suicide was not a crime, but only sinful and morally wrong, the deceased had no legal right to interfere by force, but only a moral right to interfere and try to restrain the defendant from committing a sinful and immoral act, and if, in such interference upon moral grounds only, the pistol was accidentally discharged, the defendant would not be criminally liable therefor.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

GRAY, C. J. The life of every human being is under the protection of the law, and cannot be lawfully taken by himself, or by another with his consent, except by legal authority. By the common law of England, suicide was considered a crime against the laws of God and man, the goods and chattels of the criminal were forfeited to the King, his body had an ignominious burial in the highway, and he was deemed a murderer of himself and a felon, *felo de se*. *Hales* v. *Petit*, Plowd. 253, 261. 3 Inst. 54. 1 Hale P. C. 411–417. 2 Hale P. C. 62. 1 Hawk. *c.* 27. 4 Bl. Com. 95, 189, 190. "He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head." 1 Hawk. *c.* 27, § 6. One who persuades another to kill himself, and is present when he does so, is guilty of murder as a principal in the second degree; and if two mutually agree to kill themselves together, and the means employed to produce death take effect upon one only, the survivor is guilty of the murder of the one who dies. Bac. Max. *reg.* 15. *Rex* v. *Dyson*, Russ. & Ry. 523. *Regina* v. *Alison*, 8 Car. & P. 418. One who encourages another to commit suicide, but is not present at the act which causes the death, is an accessory before the fact, and at common law escaped punishment only because his principal could not be first tried and convicted. *Russell's case*, 1 Moody, 356. *Regina* v. *Leddington*, 9 Car. & P. 79. And an attempt to commit suicide is held in England to be punishable as a misdemeanor. *Regina* v. *Doody*, 6 Cox C. C. 463. *Regina* v. *Burgess*, Leigh & Cave, 258; *S. C.* 9 Cox C. C. 247.

In the Colony of Massachusetts, by the Body of Liberties of 1641, all lands and heritages were declared to be free, not only

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from all feudal burdens, but from all "escheats and forfeitures upon the death of parents or ancestors, be they natural, casual or judicial," to which later codes, besides inserting the word "unnatural," added "and that forever." Body of Liberties, art. 10; 28 Mass. Hist. Coll. 218. Mass. Col. Laws (ed. 1660) 48; (ed. 1672) 88; Anc. Chart. 147. The principle thus declared has always been followed in practice; and there has accordingly never been in Massachusetts any forfeiture upon one's death on conviction or suicide, unless under some particular statute creating the crime, of which no instance is remembered. 5 Dane Ab. 4, 251, 252. 7 Dane Ab. 318. But suicide continued to be considered *malum in se*, and a felony.

In 1660, the Legislature "judgeth that God calls them to bear testimony against such wicked and unnatural practices, that others may be deterred therefrom," and therefore enacted that every self-murderer "shall be denied the privilege of being buried in the common burying-place of Christians, but shall be buried in some common highway where the selectmen of the town where such person did inhabit shall appoint, and a cart-load of stones laid upon the grave, as a brand of infamy, and as a warning to others to beware of the like damnable practices." 4 Mass. Col. Rec. pt. i. 432; Mass. Col. Laws (ed. 1672) 137; Anc. Chart. 187. That statute, though fallen into disuse, continued in force until many years after the adoption of the Constitution of the Commonwealth. 7 Dane Ab. 208, 298.

An early statute of the Province directed that the form of verdict upon a coroner's inquest should state "where, at what time, by what means, with what instrument and in what manner the party was killed or came by his death," and that "if it appear to be self-murder, the inquisition must conclude after this manner, viz.: And so the jurors aforesaid say upon their oaths, that the said A. B. in manner and form aforesaid, then and there voluntarily and feloniously, as a felon of himself, did kill and murder himself, against the peace of our sovereign Lord the King, his crown and dignity." Prov. St. 1700–1701 (12 W. III.) *c.* 3, § 7; 1 Prov. Laws (State ed.) 429; Anc. Chart. 350. This accorded with the usual, though perhaps not necessary, form at common law. 1 Saund. 356, note. A statute, passed at the close of the American Revolution, upon the same subject,

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reënacted these directions, except in substituting for the last clause, "against the peace and dignity of the Commonwealth and the laws of the same." St. 1783, *c.* 43, § 2.

In *Commonwealth* v. *Bowen*, 13 Mass. 356, it was held that where one counselled another to commit suicide, who by reason of his advice, and in his presence, did so, the adviser was guilty of murder. The grounds of the decision of that case appear more clearly in the full report of the trial in a pamphlet published at Northampton, in 1816, from which the statement of the case in 13 Mass. is taken.

The indictment, drawn by Perez Morton, Attorney General, contained two counts. The first count alleged that Jonathan Jewett, with a cord, of which he had tied and fastened one end around his neck, and the other end around the iron grate of a window, "feloniously, wilfully and of his malice aforethought, did hang and strangle himself," and by reason thereof died, and so, "as a felon of himself, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder himself." This count then went on to allege that the defendant, "before the felony and self-murder aforesaid," "feloniously, wilfully and of his malice aforethought, did counsel, hire, persuade and procure the said Jonathan Jewett the felony and murder of himself as aforesaid, in manner and by the means aforesaid, to do and commit," and so the defendant the said Jewett, "in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder." The second count was an ordinary count for murder, alleging that the defendant murdered Jewett by tying and fastening and procuring to be tied and fastened a cord around his neck and around the iron grate of a window, and thus hanging, strangling and suffocating him, and causing and procuring him to be hung, strangled and suffocated. Bowen's Trial, 3–6.

At the trial, before Chief Justice Parker and Justices Jackson and Putnam, the attorney general put in evidence, without objection, the verdict of the coroner's jury, finding in substance that Jewett was found dead in prison, with a cord around his neck and around the iron grate, and concluding, in the form prescribed by the St. of 1783, that he "feloniously and as a felon of himself killed and murdered himself." Bowen's Trial, 12.

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The defendant's counsel, in argument, having stated that the first count charged the defendant as an accessory before the fact by aiding and abetting the murder, and the second count as the actor or principal in the murder, the Chief Justice suggested that he conceived both counts to charge the defendant as principal, and to this the attorney general assented. p. 22.

The Chief Justice, in charging the jury, said: "You have heard it said, gentlemen, that admitting the facts alleged in the indictment, still they do not amount to murder; for Jewett himself was the immediate cause and perpetrator of the act which terminated in his own destruction. That the act of Bowen was innocent no one will pretend, but is his offence embraced by the technical definition of a principal in murder? Self-destruction is doubtless a crime of awful turpitude; it is considered in the eye of the law of equal heinousness with the murder of one by another. In this offence, it is true the actual murderer escapes punishment; for the very commission of the crime, which the the law would otherwise punish with its utmost rigor, puts the offender beyond the reach of its infliction. And in this he is distinguished from other murderers. But his punishment is as severe as the nature of the case will admit; his body is buried in infamy, and in England his property is forfeited to the King. Now if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder of A. by B.; and I apprehend that if a man murders himself, and one stands by, aiding in and abetting the death, he is as guilty as if he had conducted himself in the same manner where A. murders B And if one becomes the procuring cause of death, though absent, he is accessory." Bowen's Trial, 51, 52. It is evident that this part of the charge related solely to the first count; for the introductory words "admitting the facts alleged in the indictment" could have no application to the second count; and what was said about an accessory was comparatively immaterial, because the defendant, as we have already seen, was charged as a principal only.

Suicide has not ceased to be unlawful and criminal in this Commonwealth by the simple repeal of the Colony Act of 1660 by the St. of 1823, *c.* 143, which (like the corresponding St. of 4 G. IV. *c.* 52, enacted by the British Parliament within a year

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before) may well have had its origin in consideration for the feelings of innocent surviving relatives; nor by the briefer directions as to the form of coroner's inquests in the Rev. Sts. c. 140, § 8, and the Gen. Sts. c. 175, § 9, which in this, as in most other matters, have not repeated at length the forms of legal proceedings set forth in the statutes codified; nor by the fact that the Legislature, having in the general revisions of the statutes measured the degree of punishment for attempts to commit offences by the punishment prescribed for each offence if actually committed, has, intentionally or inadvertently, left the attempt to commit suicide without punishment, because the completed act would not be punished in any manner. Rev. Sts. c. 133, § 12. Gen. Sts. c. 168, § 8. *Commonwealth* v. *Dennis*, 105 Mass. 162. After all these changes in the statutes, the point decided in *Bowen's case* was ruled in the same way by Chief Justice Bigelow and Justices Dewey, Metcalf and Chapman, in a case which has not been reported. *Commonwealth* v. *Pratt*, Berkshire, 1862.

Since it has been provided by statute that "any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered," it may well be that suicide is not technically a felony in this Commonwealth. Gen. Sts. c. 168, § 1. St. 1852, c. 37, § 1. But being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal. Every one has the same right and duty to interpose to save a life from being so unlawfully and criminally taken, that he would have to defeat an attempt unlawfully to take the life of a third person. Fairfax, J., in 22 E. IV. 45, pl. 10. *Marler* v. *Ayliffe*, Cro. Jac. 134. 2 Rol. Ab. 559. 1 Hawk. c. 60, § 23. And it is not disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his death, is guilty of criminal homicide, and, at the least, of manslaughter.

The only doubt that we have entertained in this case is, whether the act of the defendant, in attempting to kill herself, was not so malicious, in the legal sense, as to make the killing of another person, in the attempt to carry out her purpose, murder, and whether the instructions given to the jury were not therefore too favorable to the defendant. *Exceptions overruled.*

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COMMONWEALTH *vs.* GUILFORD WHITE.

Suffolk. March 26, 27. — June 26, 1877. Nov. 27. — Dec. 7, 1877. LORD & SOULE, JJ., absent.

A thief, who steals goods in another state and sends them into this Commonwealth by an agent, not an accomplice in the theft, may be indicted for larceny here.

On an indictment for receiving stolen bonds, the property of one S., it appeared that the bonds were stolen from S. in another state by some person unknown, and were afterwards brought into this Commonwealth by a person from whom the defendant received them in Boston. The defendant requested the presiding judge to instruct the jury that, in order to convict, "the jury must be satisfied that the defendant received the bonds in this state from the person who actually stole them from the said S." The judge refused this request, and instructed the jury that "it is not necessary that the person who actually committed the theft should bring the bonds into this Commonwealth; but if any one acting for and in behalf of the thief, or aiding such thief by receiving, having or holding the same after the actual theft, and knowing that they were stolen, brings them into this Commonwealth, and the defendant received the bonds in the county of Suffolk from any such person, knowing that they were stolen, and this is proved beyond a reasonable doubt, the jury must convict." No question was raised as to the unlawful intent of the defendant, and a bill of exceptions, allowed by the judge, stated that "upon other branches of the case instructions were given to which no exceptions were taken." *Held*, that this instruction, by the fair construction of it, presented the case of bonds being brought into this Commonwealth by some person acting for the thief as his agent and not of a person, who, having bought them in another state, brings them here on his own account. *Held*, *also*, that it was to be presumed that the judge instructed the jury that the words "knowing that they were stolen" imported a guilty knowledge.

On an indictment for receiving "three bonds of the United States, each of the value of ten thousand dollars, of the property" of one S., it appeared that the bonds were, after they were stolen, and before they were received by the defendant, fraudulently altered by erasing the name of S. and inserting the name of C.; the verdict was "guilty of receiving two bonds." *Held*, that the fraudulent alteration did not take away from them the character of bonds of the United States or deprive S. of his ownership in them.

INDICTMENT in four counts, charging the defendant with receiving three bonds of the United States, knowing them to be stolen.

At the trial in the Superior Court, before *Bacon*, J., the jury returned a verdict of guilty, on the second count, of receiving two of the bonds; and the defendant alleged exceptions, the material parts of which appear in the opinion.

The case was argued in March, 1877, and a rescript was entered overruling the exceptions. The defendant thereupon

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moved for a rehearing, and this motion was argued in November, 1877.

H. W. Paine, (*T. L. Wakefield* & *D. C. Linscott* with him,) for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

MORTON, J. The second count of the indictment, upon which alone the defendant was convicted, charges that the defendant at Boston "three bonds of the United States, each of the value of ten thousand dollars; three pieces of paper, each of the value of ten thousand dollars, of the property, goods and chattels of one Amasa Stone, then lately before within said Commonwealth stolen, taken and carried away by a certain evil disposed person, feloniously did buy, have, receive and aid in the concealment of, he the said White then and there well knowing the said property, goods and chattels to have been feloniously stolen as aforesaid."

It appeared at the trial that the bonds were stolen from Stone in the State of New York by some person unknown, and were afterwards brought into this Commonwealth by one Chapman, from whom the defendant received them in Boston. The defendant requested the court to instruct the jury "that in order to convict under the second and fourth counts, the jury must be satisfied that the defendant received the bonds in this state from the person who actually stole them from said Stone." The court refused this request, and instructed the jury that "it is not necessary that the person who actually committed the theft should bring the bonds into this Commonwealth; but if any one acting for and in behalf of the thief, or aiding such thief by receiving, having or holding the same after the actual theft, and knowing that they were stolen, brings them into this Commonwealth, and the defendant received the bonds in the county of Suffolk from any such person, knowing that they were stolen, and this is proved beyond a reasonable doubt, the jury must convict."

The parties differ as to the construction of these instructions. The defendant contends that the instructions were intended to present two alternative states of fact, under either of which the defendant might be convicted; and that under them the jury

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might convict, either if the person who brought the bonds into this state was in so doing acting as the agent of the thief, or if such person had bought them or otherwise obtained them of the thief in New York and afterwards brought them into this state upon his own account and acting independently of the thief. But we are unable to adopt this construction. In the instructions the participles "acting" and "aiding" and the verb "brings" are all in the present tense and all refer to the same point of time. The meaning is the same as if the sentence were transposed, and read, that if any person brings the bonds into this state, then acting for and in behalf of the thief, or then aiding such thief by receiving, having or holding the same, the defendant might be convicted if he received the bonds of such person knowing that they were stolen. The idea expressed is that such person is acting for the thief or aiding the thief in bringing them into this state. This is inconsistent with the defendant's construction. If he had bought them previously and brings them here acting solely upon his own account, he could not in any fair sense be said to be aiding the thief.

The instruction was given in response to a special request for a ruling that "the jury must be satisfied that the defendant received the bonds in this state from the person who actually stole them." No instructions were requested as to what the law would be, if the bonds had been brought here by a person, acting for himself, who had bought them in New York, and the bill of exceptions does not show that this question was important or arose at the trial. If this question had been in the mind of the presiding justice, it is difficult to believe that a ruling to the effect that the defendant might be convicted if the bonds were brought here by any one having then no connection with the thief, could have been expressed in the language of the instructions given.

We are of opinion that the two clauses of the instructions were intended to be explanatory of each other, and not intended to present two alternative and exclusive propositions; and that by the fair construction of the instructions, they suppose the case that the bonds are brought into this Commonwealth by some person acting for the thief as his agent, and not that they are brought here by a person who has bought them in New York, and who, in bringing them here, acts on his own account and independently of the thief.

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Assuming, for the purposes of the case, that it was necessary for the government to prove, as alleged in the indictment, that the goods received by the defendant were stolen in this Commonwealth, the question is presented whether, under the circumstances stated in the instruction, the original thief is guilty of a larceny in this Commonwealth.

To put the case in the light most favorable to the defendant, the question is whether, if a man, who was never in this state, steals property in another state, and sends it here by the hand of an agent to be sold, he is guilty of larceny of the property here.

It has been held from the earliest times that if a person steal goods in one county and bring them into another, he may be indicted for larceny in either county. His unlawful possession in the second county is deemed to be a continuance of the original taking and asportation. And it has been settled in this Commonwealth, so as not now to be an open question, that if the thief bring into this state property stolen in another state, it is a new taking and asportation in this state, and he may be here indicted for larceny of the property. *Commonwealth* v. *Cullins*, 1 Mass. 116. *Commonwealth* v. *Andrews*, 2 Mass. 14. *Commonwealth* v. *Uprichard*, 3 Gray, 434. *Commonwealth* v. *Holder*, 9 Gray, 7. *Commonwealth* v. *Macloon*, 101 Mass. 1. If, therefore, the thief himself had brought these bonds into this state and disposed of them, he might have been indicted and punished here for larceny.

The case finds that he did not personally come into this state, but sent the stolen bonds here by the hand of an agent. The agent who brought them here, not being a participant or accomplice in the original theft, could not be indicted for larceny, though he knew that they were stolen. The original taking, of which the possession and control of the goods here is a renewal or continuance, was not done by him, and therefore all the elements of the crime could not be proved against him. But it is not uncommon under the criminal law that a man may commit a crime without being personally present. Thus a man who erects a nuisance in a river or stream in one county or state, is liable criminally as well as civilly in every county or state in which it injures the land of another. One who publishes a libel in another state in a newspaper which circulates also in this

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Commonwealth, is liable to indictment here. If a man incites an insane person or a child or an innocent agent to commit a larceny in his absence, he is liable to the same extent as if personally present at the commission of the crime; and this is so, even if he was all the time in another jurisdiction. *Commonwealth* v. *Macloon*, 101 Mass. 1, and cases cited. *People* v. *Adams*, 3 Denio, 190. *The King* v. *Brisac*, 4 East, 164. *Rex* v. *Cooper*, 5 Car. & P. 535. *Regina* v. *Bannen*, 2 Moody, 309. *Regina* v. *Michael*, 2 Moody, 120. *The Queen* v. *Valler*, 1 Cox C. C. 84. *The Queen* v. *Manley*, 1 Cox C. C. 104. *The Queen* v. *Bull*, 1 Cox C. C. 281.

The personal presence of the thief is not always necessary to make him guilty of a larceny. If he does in this state, either personally or by the hand of another, who is not a principal in the larceny, all the acts which constitute the essential elements of the crime, he may be indicted and punished in this state if he can be apprehended within its jurisdiction. It is true that it has been held that when the agent is a guilty actor in the commission of the felony, he is the principal offender, and the procurer is an accessory before the fact; but when the agent is not guilty of the principal crime, the procurer is regarded as the principal, though absent.

In the case at bar, a person unknown to the jury stole the bonds in New York. He entrusted them to the hands of an agent, not an accomplice in the theft, and sent them into this Commonwealth to be disposed of. While they were here, in the hands of his agent, he had the same control and power over them as if he held them here in his own hands. His mind directed the disposition of them; he sold them to the defendant. We think the maxim, *qui facit per alium facit per se*, applies, and that he was liable, criminally as well as civilly, for the acts of his agent to the same extent as if done by him in person. The agent is not guilty of a larceny, for the reason we have before stated. But the principal thief, having, through his agent, been in possession and having disposed of the bonds here, has here committed all the essential acts necessary to make the crime of larceny. He has here wrongfully and fraudulently taken and carried away the goods of another, with the felonious intent to convert them to his own use and make them his own property

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without the consent of the owner. We are therefore of opinion that the instruction we are considering was correct.

The defendant contends that as the bonds stolen in New York were, after they were stolen, and before they were received by him, fraudulently altered by erasing the name of the payee, "Amasa Stone, Jr., Cleveland, Ohio," and inserting "B. F. Caldwell, New York," the conviction against him cannot stand. The second count charged him with receiving "three bonds of the United States, each of the value of ten thousand dollars." The verdict was "guilty of receiving two bonds."

The fraudulent alteration by the thief or an accomplice or confederate of the bonds did not take away from them the character of bonds of the United States, and did not deprive Stone of his ownership. They still were bonds which, if Stone could regain possession of them, he might recover of the obligors at their full value. The fact that the character of stolen property is changed before it reaches the receiver is not material, if he knows that it was stolen property. *Rex* v. *Cowell*, 2 East P. C. *c.* 16, § 48. The bonds received, though altered, were the same bonds which were stolen, and were sufficiently and properly described in the indictment as "bonds of the United States."

The defendant now contends that the instructions were erroneous, because under them the jury would be authorized to convict the defendant if he received the stolen bonds innocently and without any unlawful intent. No such question was raised at the trial or is fairly open under the bill of exceptions. The bill purports to recite only the instructions so far as they relate to the subjects of the defendant's special requests, and states that "upon other branches of the case instructions were given to which no exceptions were taken." It is to be presumed that the court correctly instructed the jury upon the elementary principle that the words of the statute, "knowing the same to have been stolen," import a guilty knowledge.

Exceptions overruled.

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COMMONWEALTH *vs.* TIMOTHY COUGHLIN.

Suffolk. Nov. 26. — Dec. 31, 1877. COLT & LORD, JJ., absent.

The St. of 1876, *c.* 17, authorizing the arrest of intoxicated persons without a warrant, covers the case of a person found in a public place in a state of intoxication, whether the intoxication was or not produced by means which render the intoxicated person guilty of the crime of drunkenness under the Gen. Sts. *c.* 165, § 25.

A person who is arrested on a charge of drunkenness by an officer in the discharge of his duty without a warrant, under the St. of 1876, *c.* 17, and who commits an assault upon the officer while under arrest, may be convicted of such assault, although he has been acquitted of the charge of drunkenness in the lower court; such acquittal not being conclusive evidence that he was not drunk when arrested, nor that the officer was not in the discharge of his duty in making the arrest.

INDICTMENT for assault upon an officer while in the discharge of his duty.

At the trial in the Superior Court, before *Dewey*, J., it appeared that the defendant had been arrested under the St. of 1876, *c.* 17, by Emery A. Dresser, a police officer of the city of Boston, without a warrant, on a charge of drunkenness; that he was tried for this offence before a court of competent jurisdiction, and was found not guilty and discharged; and that while under arrest on the charge of drunkenness, and when about to be locked up by the officer, he committed the assault complained of.

The defendant requested the judge to instruct the jury that the officer, having arrested the defendant without a warrant, on the charge of drunkenness, of which the defendant was found not guilty after due hearing and trial, was a trespasser, and guilty of an illegal arrest; that said trespass and illegal arrest continued, and that he could not therefore be considered as an officer in the discharge of his duty when assaulted. There was evidence tending to show that the defendant was drunk when arrested, and this was not denied by the defendant in his testimony on the stand.

The judge declined to rule as requested; but instructed the jury that the officer had a right to arrest for drunkenness without a warrant; that the discharge of the defendant in the lower court was not conclusive that he was not drunk; and that the jury might on this evidence convict the defendant of an assault,

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as charged in the indictment, on an officer in the discharge of his duty.

The jury returned a verdict of guilty; and the defendant alleged exceptions to the ruling and refusal to rule as requested.

W. W. Doherty, for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

SOULE, J. The crime of drunkenness as set forth in the Gen. Sts. *c.* 165, § 25, is "drunkenness by the voluntary use of intoxicating liquor." It is possible, therefore, that one may be drunk without being guilty of the offence described. Arrested in a public place, kept in custody till sober, and then brought before a court of justice, he may be able to show that the intoxication, which he admits existed, was produced by some other cause or means than the voluntary use of intoxicating liquor. If he does this, he is entitled to acquittal and discharge.

The right of an officer to arrest without a warrant reaches, by the St. of 1876, *c.* 17, the case of any person found in a public place in a state of intoxication, and does not depend on the intoxication having been produced by means which render the intoxicated person guilty of the crime of drunkenness. The mere fact therefore, that one arrested, by an officer without a warrant, for drunkenness, was acquitted at the trial of the complaint, is not conclusive evidence that he was not drunk when arrested, nor that the officer was not in the discharge of his duty in making the arrest and keeping him in custody afterward, as a preliminary to making complaint against him. The instructions asked for by the defendant were therefore properly refused; and there is nothing in the exceptions to show that the instructions given were not warranted by the evidence in the case.

Exceptions overruled.

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COMMONWEALTH *vs.* THOMAS L. HURD.

Suffolk. Nov. 26 — Dec. 31, 1877. COLT & LORD, JJ., absent.

On the trial of an indictment for larceny, there was evidence that the property had been entrusted to the custody of the defendant; that he had sold it and absconded with the proceeds of the sale. The evidence was conflicting on the question whether the defendant had authority from the owner of the property to make the sale. The judge instructed the jury that "if the defendant sold the property, rightfully, or under an honest belief that he had such right, no wrongful appropriation or keeping of the money would warrant a verdict of guilty; that the fact, if proved, that the defendant absconded and kept the money might be considered by the jury as evidence bearing upon the question whether the taking and selling of the property was felonious." *Held*, that the defendant had no ground of exception.

INDICTMENT for larceny on April 14, 1877, of a horse and two wagons alleged to be the property of William C. Hawkes.

At the trial in the Superior Court, before *Wilkinson*, J., the government introduced evidence tending to show that Hawkes had his place of business near the defendant's stable, and kept his horse and wagons in that stable; that Hawkes offered the defendant a commission if he would bring to him a purchaser of the horse and wagons at a stated price, but in no case was the defendant to make a sale of the property. This was denied by the defendant, who offered evidence tending to show that he was authorized by Hawkes to sell the property to any purchaser he might find, with no limitation, except as to price. It also appeared in evidence that on April 14, 1877, the defendant sold and delivered the horse and wagons by bill of sale to one Keenan, for $210, and that this money was never paid over or offered to be paid over to Hawkes. The government also introduced evidence tending to show that the defendant absconded with the money, and could not be found by the officer who had a warrant for his arrest.

The defendant asked the judge to instruct the jury that, if the defendant, after selling the property rightfully, intended upon receiving the proceeds of such sale, or after receiving such proceeds, to convert them to his own use, and did in accordance with such intention keep the same, such intention and keeping was not evidence tending to show the alleged larceny.

The judge declined to instruct the jury in the manner requested; but on this part of the case, instructed them as follows:

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The defendant is charged in the indictment with a larceny of the wagons and horse, and not of the money received therefor; and unless the jury are satisfied, beyond a reasonable doubt, that the taking and selling of the wagons and horse was without right or color of right, the defendant cannot be convicted. If the defendant sold the wagons and horse rightfully, or under an honest belief that he had such right, no wrongful appropriation or keeping of the money would warrant a verdict of guilty. The fact, however, if the jury find it proved, that the defendant absconded and kept the money may be considered by the jury as evidence bearing upon the question whether the taking and selling of wagons and horse were felonious."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

ENDICOTT, J. The defendant was indicted for larceny of a horse and two wagons. It appeared in evidence that he took and sold them without authority from the owner, absconded and kept the money obtained from the sale. The defence was that he was authorized by the owner to sell to any purchaser he could find, and on this point there was conflicting evidence.

If he was authorized to sell, or honestly believed he had the right to take and sell the property, his subsequent flight and wrongful appropriation of the money would not justify the jury in finding him guilty of larceny. But if he was not so authorized, and the taking and selling were without right or color of right, then evidence of his subsequent conduct was competent to show the intent with which he took and sold the property. This was in substance the ruling of the presiding judge, and we fail to see that the defendant has any just ground of exception. The first question for the jury to determine was whether the defendant had authority to take and sell the horse and wagons; if they found that he had or honestly believed that he had, that was the end of the case; and in deciding that question his subsequent conduct was immaterial. If, on the other hand, they found that he had no authority and knew he had not, then all his subsequent acts in connection with the transaction were compe-

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tent, as bearing on the question whether the taking and selling were felonious, and in that view they could properly take into consideration his flight and wrongful appropriation of the proceeds of the sale. *Exceptions overruled.*

COMMONWEALTH *vs.* DENNIS MCDERMOTT & another.

Suffolk. Nov. 26. — Dec. 31, 1877. COLT & LORD, JJ., absent.

A person who is held in custody on a charge of crime jointly with another person is not called upon to contradict statements prejudicial to him, made in his presence by the other person, in answer to inquiries made by an officer; and such statements, though not contradicted by him, are not admissible in evidence against him.

INDICTMENT against Dennis McDermott and Michael Malone, charging them with larceny of a watch from the person of Charles H. Fessenden. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

It appeared that the defendants, after their arrest, were searched in the station-house, and the watch was found upon McDermott; that the officer then, in the presence and hearing of Malone, asked McDermott how he came by the watch; that he replied, Malone gave it to him; and that Malone said nothing.

Malone then asked the judge to rule that this evidence should have no bearing against him. This the judge declined to do, and instructed the jury that it was a question for them, whether the conduct and silence of Malone was an admission of the truth of the answer of McDermott; and, if so, it was evidence for them to consider, giving it such weight as they thought it deserved; otherwise, it was to be rejected in considering the case of Malone.

The jury returned a verdict of guilty against both defendants and the defendant Malone alleged exceptions.

C. J. Brooks, for the defendant Malone.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

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SOULE, J. The defendant Malone, while held in custody, had a right to keep silence as to the crime with which he was charged, and all circumstances connected with it, and was not called upon to reply to or contradict any statements made in his hearing. No inference against him was warranted by his failure to deny the truth of what McDermott said to the officer. *Commonwealth* v. *Kenney*, 12 Met. 235. *Commonwealth* v. *Walker*, 13 Allen, 570. The conversation between the officer and McDermott was therefore inadmissible against Malone, and he was entitled to the ruling asked for. The learned judge who tried the case erred in submitting to the jury the question whether the silence of Malone was an admission of the truth of the answer of McDermott, and the entry must be

Exceptions sustained.

DENNIS HANNAN *vs.* ELLEN HANNAN & others.

Hampden. Sept. 25. — Dec. 31, 1877. ENDICOTT & LORD, JJ., absent.

In a writ of entry brought by a mortgagee against the heirs of the mortgagor, to foreclose a mortgage of land, it is a good defence that the mortgage was given without consideration; and parol evidence is admissible to show that no debt ever existed between the parties to the mortgage.

WRIT OF ENTRY, dated October 6, 1862, against the heirs of James Hannan, to foreclose a mortgage of land in Brimfield. Plea, *nul disseisin*, with a specification of defence that the mortgage was given without consideration, and was never intended or considered by the parties to it as a valid transaction.

At the trial in the Superior Court, before *Brigham*, C. J., it appeared that James Hannan, on October 6, 1862, executed and delivered the mortgage to the demandant. The consideration stated in the mortgage was $1200, and the condition was as follows: "Provided nevertheless, that if the said James Hannan, his heirs, executors or administrators, shall pay unto the said Dennis Hannan, his executors, administrators or assigns, the sum of twelve hundred dollars on demand, with interest annually, then this deed, as also a note bearing even date with these presents, signed by the said James Hannan, whereby he prom-

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ises to pay to the said Dennis Hannan the said sum and interest at the times aforesaid, shall both be absolutely void to all intents and purposes."

The demandant contended that there was a pecuniary consideration for the mortgage, but that no note, as recited in the mortgage, was given, and he produced none; and he further contended that a consideration was implied from the instrument. It was conceded that nothing had been paid upon the mortgage, either principal or interest.

The tenants contended that it was competent for them to show by parol evidence that no indebtedness ever existed between the parties to the mortgage, as a consideration therefor; that the mortgage was given without consideration, and was not given by James to Dennis Hannan as a gift, but to put the property out of his hands to protect it against possible liabilities to third parties; and contended that such proof, showing that there was no debt due, would constitute a good defence to the action, and that no conditional judgment could be had.

It was thereupon agreed that, if such proof was competent, and a good defence, judgment should be entered for the tenants; otherwise, judgment for the demandant, and conditional judgment for $800, and interest from the date of the mortgage.

By agreement of both parties, the case was taken from the jury before verdict, and reported to this court.

G. M. Stearns & M. P. Knowlton, for the demandant.

W. S. B. Hopkins, for the tenants.

AMES, J. The question raised by the bill of exceptions has been fully disposed of by the decision of this court in the case of *Wearse* v. *Peirce*, 24 Pick. 141. It was there held that in an action between the original parties, brought for the foreclosure of a mortgage given as security for a promissory note, the fact that the note was given without consideration was a good bar to the action, by showing nothing due. The question in such a case, whether anything is due upon the note, must be conducted in nearly the same way, and depend mainly upon the same evidence, as if the note were in suit. In such an action the defendant may show the same matters in defence against the mortgage, except only the statute of limitations, that he could against the note. *Vinton* v. *King*, 4 Allen, 562. *Freeland* v. *Freeland*,

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102 Mass. 475. *Holbrook* v. *Bliss*, 9 Allen, 69. It was also ruled in *Wearse* v. *Peirce* that this defence is not rebutted by showing that the note was given in fraud of the rights of creditors, for the reason that, if there had been such an intent, it was common to both parties, and the demandant is not in a position to avail himself of that fact. In such a state of facts, the maxim, *potior est conditio defendentis*, would be applicable. It is true that if the deed, instead of being a mortgage, had been a conveyance of an absolute estate, the law would not aid the grantor to recover it back. And for a like reason it will not aid the mortgagee, who is the actor, to enforce the payment of a fraudulent note to which he is a party.

As we see no reason for overruling *Wearse* v. *Peirce*, which seems to us to be entirely within the spirit and letter of the statute in relation to the conditional judgment in such an action, (Gen. Sts. *c.* 140, § 5,) we must order, according to the terms of the reservation, that *Judgment be entered for the tenants.*

MARIA SLACK, administratrix, *vs.* MARY A. SLACK.

Bristol. Oct. 24. — Dec. 21, 1877. LORD & SOULE, JJ., absent.

In a probate appeal, the decision of a single judge on questions of fact will not be reversed, unless it is clearly shown to be erroneous.

An intestate left a widow, to whom he was married in 1855, after having unlawfully cohabited with her for eight years. They lived together after marriage for about two years, when difficulties arising between them on account of his gross and confirmed habits of intoxication, which had existed throughout their cohabitation, they agreed that she should live apart from him for a year and then return. Before she went away, he withdrew his consent, but she insisted on leaving. At the end of the year she returned, but, finding that he had a housekeeper, with whom she believed him to be living in adultery, there being no bed in the house but his own, she went away and never returned, and was not asked to do so, but continued living apart from him, rendering him no services and supporting herself, until his death, which took place some years afterwards. She had no children by him, was in her seventieth year, and had no means of support. The Probate Court, upon the application of the widow, made her an allowance of $350; and its decree was affirmed, on appeal by the administratrix, by a justice of this court. *Held*, upon appeal to the full court, that the decree should be affirmed, with costs.

At the hearing on an appeal by an administratrix from a decree making an allowance to the widow of an intestate, evidence that the assets in the hands of the appel

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lant are insufficient to pay the allowance made to the appellee by the Probate Court is inadmissible, if the fact of such insufficiency is not stated as one of the reasons of the appeal.

APPEAL from a decree of the Probate Court, made December 1, 1876, allowing $350 to Mary A. Slack, as the widow of Welcome A. Slack, upon her petition, dated October 31, 1876, for an allowance out of the estate of her deceased husband.

The appellant, who was administratrix and an heir at law of Welcome A. Slack, filed the following reasons of appeal: "1. That the said Mary A. Slack was never lawfully married to said deceased, and is not his widow. 2. That said Mary A. Slack had deserted the said Welcome A. Slack for about fifteen years previous to his decease, and had lived entirely apart from him, was not a member of his family or household at the time of his decease, and had no claim in law or equity to any allowance out of his estate for necessaries, if she was ever his lawful wife."

Hearing before *Gray*, C. J., who affirmed the decree of the Probate Court, and, on an appeal being taken to the full court, made, for the purposes of the hearing on the appeal, a report of the facts as follows:

"The petitioner was formerly married to Peter Clark, and continued to be his lawful wife until 1855. In 1847, she went to live with the intestate as his housekeeper, and they cohabited as husband and wife from that time until 1858, when they were lawfully married, and afterwards continued to live together as husband and wife for about two years. Difficulties arising between them on account of his gross and confirmed habits of intoxication, which had existed throughout their cohabitation, they agreed that she should live apart from him for a year and then return. Before she actually went away, he withdrew his consent and urged her to remain, but she insisted on leaving him according to their agreement, and went to live with her daughter by the first marriage in another town. At the expiration of the year she returned to his house, but, finding that he had obtained another housekeeper, with whom she believed him to be living in adultery, (there being no bed in the house but his own and a lounge in his room,) she went away again and never returned, or was asked by him to return, and continued to live apart, rendering him no services and supporting herself, until

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his death. She has no children by him, is in her seventieth year, and has no means of support.

"The appellant objected that it did not appear that the assets in her hands as administratrix were sufficient, and offered to prove that, by reason of their turning out to be of less value than was stated in her inventory, they were insufficient to pay the allowance ordered by the Probate Court. But it appeared that she had not rendered any account. And it was ruled that the objection was not open, and the evidence not admissible, under the reasons of appeal."

J. Daggett, for the appellant.

H. B. Crandall, for the appellee.

COLT, J. The evidence upon which the decree of the Chief Justice was based has not been reported. The report states all the facts deemed by him to be material on the question presented. All inferences of fact, and questions of discretion as well as of law, involved in the decree, are open to revision upon this appeal. But the decision of the single judge on questions of fact in a probate appeal, as in a suit in equity, will not be reversed, unless it is clearly shown to be erroneous. *Wright* v. *Wright*, 13 Allen, 207. *Allen* v. *Allen*, 117 Mass. 27.

The statute gives a discretionary power to the judge of probate to make such allowance to the widow as he shall judge fit for the supply of necessaries for her use, "having due regard to all the circumstances of the case." The question how much shall be allowed must depend upon the varying circumstances of each case, with reference to which no general rule can well be stated. The fact that the parties lived separate, or which party was the culpable cause of the separation, may have little application to the question. "The allowance," as remarked by Shaw, C. J., in *Hollenbeck* v. *Pixley*, 3 Gray, 521, "is not made to the widow as a reward for faithful service as a wife; nor is it given out of the husband's estate as compensation to her for ill treatment by him as a husband; but it is a question solely of her actual necessities." Gen. Sts. *c.* 96, § 5.

There is nothing in the facts reported in this case, which leads us to think that the decree of the Probate Court, or of the Chief Justice of this court, ought not to be affirmed. And there was no error in the ruling of the Chief Justice which confined

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the evidence offered by the appellant to the issues raised by the reasons of appeal.

The widow having prevailed in this case, as in *Allen* v. *Allen*, 117 Mass. 27, in two successive appeals from a decree granting her an allowance, the decree of the Chief Justice, affirming the decree of the Probate Court, should be

Affirmed, with costs.

EDWARD S. MATTHEWS *vs.* CHARLES E. FULLER & another.

Suffolk. Nov. 20. — Dec. 11, 1877. COLT & LORD, JJ., absent.

B., a broker, advised A. to sell certain unregistered bonds and buy certain other bonds. A., in reply, by letter, said, "I am most anxious to get my money in registered bonds," authorized B. to sell the bonds then held by B. for him, "and invest the amount in the best paying and surest bonds that you know of." "As these bonds are all I possess, I am naturally always anxious about them, for the reason that, if lost or stolen, I could recover nothing. You will please invest the results of the sale in the I. bonds, [the ones recommended,] or any sure road." "I want registered bonds of which I will have no trouble in drawing the interest." "I shall feel under many obligations if you will kindly make such sale and purchases of bonds as your good sense dictates." It was agreed that the bonds referred to by B. were first-mortgage bonds. B. in fact bought some first-mortgage and some second-mortgage bonds, all of which were unregistered. *Held*, that, if he acted in good faith, it was within the scope of the authority conferred upon him by the letter of A.

On the issue whether A., by failing to object to a purchase of certain bonds by B. on A.'s account, had ratified the purchase, A. contending that he only authorized the purchase of registered bonds, while those bought were unregistered, A. testified that he knew from his wife that the bonds had been bought; that it was a tabooed subject between them; that she grew very excited over it; that they had lost all confidence in the bonds, and considered them worthless two years before he repudiated the purchase; that he knew it from what a third person told him; that this person said that B.'s reputation was not worth a copper; that he would not leave a ten-dollar bill with him. The judge, in instructing the jury, called their attention to the fact that the plaintiff had testified that he knew the bonds were worthless, that he had lost his money, and that the subject was so painful to his wife that it was tabooed between them; but omitted to state what the plaintiff testified as to his means of knowledge, and left it to the jury to say whether it was a fair inference from the plaintiff's testimony, that, two years before the repudiation, he was in possession of knowledge that his instructions to B. had not been complied with. *Held*, that A. had no ground of exception.

CONTRACT for money had and received. The declaration also contained counts in tort, alleged to be for the same cause of ac-

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tion. Writ dated November 2, 1874. Trial in this court, before *Soule*, J., who allowed a bill of exceptions in substance as follows:

It appeared in evidence that, at some time prior to June, 1871, the plaintiff, a surgeon in the United States navy, left ten bonds of the Union Pacific Railroad in the keeping of the defendants, who were bankers and brokers in Boston; that on June 21, 1871, he sent the following letter, signed by him, to the defendants: "Please hand over to Mrs. Matthews the $10,000 in Union Pacific bonds which you now hold belonging to me. Remove the coupons due next month, and after selling the gold send Mrs. M. a draft for $100. The remainder please hold on deposit; and as I shall increase it from time to time, I shall request you to invest it judiciously. Mrs. Matthews will call at your office for the bonds. If convenient, please hand her a draft, due July 1st, for $100. I shall send you gold drafts from Brazil, which I request you will invest;" that on June 23, 1871, the plaintiff sailed from Portsmouth, New Hampshire, on the United States steamer Ticonderoga, for a cruise on the east coast of South America.

It further appeared in evidence that, on June 21, the plaintiff's wife came to Boston and informed the defendants that her husband had instructed her to get his bonds from them, and hire a safe in the Union Safety Deposit vaults, in Boston, and place the bonds in it, and exhibited to the defendants a written order from her husband to them, to deliver the bonds to her; that the defendants then advised her, and she concluded that it would be safer, to leave the bonds in their keeping, which she did; and that the defendants then wrote the following letter to the plaintiff: "Boston, June 23, 1871. Dear sir: We told your wife today that if the U. P. bonds were our own we would not hold them all, but would sell half of them, and put the balance into something else, although the condition of the road is better at this time than at any time since the bonds were issued; and she remarked that she might want to use them, or part of them, in Rio, which would be a very difficult thing to do, as we presume that they are not known in that market. We also suggested that in case of loss, by theft or otherwise, there could be nothing recovered; whereas, if you had registered bonds of some

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kind, no loss of the bonds would affect your title to them, or the power to draw the interest regularly. We wish that you had taken Iowas (7% gold); they are now 95, and few for sale; we knew that they would advance when the road was completed."

To this letter the plaintiff replied from Rio de Janeiro on August 25, 1871, as follows: "I have the pleasure to acknowledge the receipt of your kind letter, which reached me yesterday. You are probably aware that the bonds which are in your keeping constitute my entire wealth; they are all I have, and naturally I desire to have them in safe keeping, and hence my acceptance of your kind offer of your box in the Safety Deposit vault. You recommend Central Iowas, and advise me to sell my Pacifics and buy them. If the Pacifics go up to 90, — accrued interest to be added, — I think it well to sell them. I have lost the run of the market, and therefore I must leave the sale of these bonds to your judgment. I am most anxious to get my money in *registered bonds*, so that, if lost, I can recover. Therefore, if Pacifics are as high as at any past period, — say 90, accrued interest to be added, — or as high as it is probable they will go for a long period, you may sell all of them, and invest the amount in the best paying and surest bonds that you know of. As these bonds are all that I possess, I am naturally always anxious about them, for the reason that if lost or stolen, I could recover nothing. I don't recollect what Iowas were when you advised me to buy. You will therefore please to invest the results of the sale of the Pacifics in the Iowas (seven per cent. gold), or any sure road. Mrs. M. writes me you offered to take the same interest in the sale and purchase of bonds for me as if you had a personal interest in them, and therefore I will leave the sale of the Pacifics to your good sense, and superior knowledge of the stock market. Is there not a probability of the Pacifics going up to par when the company withdraw their ten per cents? Could you not get me Iowas in exchange for Pacifics, even? I want registered bonds, of which I will have no trouble in drawing the interest. Of course I desire to sell all, as the same objection exists to possessing a thousand as exist to having ten thousand. From time to time, I will send you gold drafts on England, which you will please place to my credit, and invest in safe, liberal paying bonds. I have sent Mrs. Matthews an order for one hundred

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dollars, which you will please honor. I shall feel under many obligations if you will kindly make such sale and purchases of bonds as your good sense dictates."

The defendant, who wrote the above letter of June 23, testified, on being shown the letter, in cross-examination, that this letter was written with a view to getting the plaintiff to invest in Iowas; that of course he intended to have him understand that Iowas could be registered; but he added that the letter spoke for itself.

It appeared that the Iowas mentioned in the defendants' letter of June 23 were the first-mortgage bonds of the Central Iowa Railroad; that the defendants had them for sale for said railroad; and that, prior to June 23, the defendants had recommended them to the plaintiff as an investment. It further appeared that in July, 1871, the defendant began selling for the Central Iowa Railroad its second-mortgage bonds; and that on October 3, 1871, the plaintiff's wife called on them, and they showed her the above letter of the plaintiff's of August 25, 1871, and they wrote, and she signed and gave them, the following order: "October 3, 1871. Please sell five thousand dollars U. P. first mortgage, at eighty-eight, or better, and buy five thousand Iowa second. Mary E. Matthews;" that the defendants thereupon sold five of the plaintiff's bonds, and invested the proceeds in five of the second-mortgage bonds of the Iowa Central, which they had for sale. The defendants also received the following letter from the plaintiff, enclosing the drafts therein mentioned: "Rio de Janeiro, Brazil, September 4, 1871. Herewith I enclose to you a draft on London for £101 10*s.* 6*d.*, in your favor, at sixty days; also one on London at sight, for £50 5*s.* 2*d.* in your favor. Please invest the results of the sale of these bills in such stock as may seem most desirable. If you consider the Iowas good, — sure beyond doubt, — put the money in them. If it is agreeable to you, I will be glad to have you invest for me such money as I may, from time to time, be able to send to you."

It also appeared that the following correspondence ensued between the defendants and the plaintiff's wife: "Providence, R. I., October 10, 1871. C. E. Fuller & Co.: How are the bonds; have you sold them, and what do you think of the Union Pacifics? It seems to me that the fall in bonds, now since the

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fire in Chicago, would make a good time to buy Iowas. I hope you sold the Pacifics before the news came. I had a letter from the doctor a day or two since, and he says he wants to get registered bonds, but I suppose they are very high. What kind of registered bonds are there to be had, and how much are they? Mary E. Matthews."

"Boston, October 11, 1871. Mrs. Mary E. Matthews: We have received your favor of the tenth, with enclosures as stated. We have exchanged five thousand dollars of your Union first-mortgage 6's for Iowa Centrals. We have suffered no loss from the Chicago disaster, but think it would have the effect rather of enhancing the value of the Iowas. The market on Union Pacific 6's has declined steadily, closing last night in New York at 82⅞ and interest bid. The Iowa Central bonds can be registered by forwarding the bonds to the company's agents, they only giving you a receipt, interest being collected by a power of attorney. We think it would be better for you, if you wish to make any change, to hire a safe in the Safe Deposit Company, for twenty dollars a year. We are sorry you did not give us an order to sell the other 5M. Union Pacific 6's, but we could not sell without an order, although we thought advisable so to do. They may rally, and if you wish us to exchange the other five for Iowas, without loss to you, we think it advisable to do so, and will, on your written order to that effect. C. E. Fuller & Co."

"Providence, R. I., October 13, 1871. C. E. Fuller & Co. Yours of the eleventh is just received. I am glad you did not suffer by the loss of property in the Chicago fire. It is queer that it should affect the Union Pacific 6's so much. I do not want to sell as low as 82⅞, for I think some of the bonds cost that, and I want to make something on them; but I will trust to your good judgment, and give you an order to sell the remaining five thousand whenever you have a good opportunity, and change them for Iowas or other bonds. If you think best you might buy some Iowas with the one thousand dollars in your hands; of course use your judgment about it. If you know of any other good investment it may be well to have some money in other things. I leave for New York on Friday, and when I return to Providence I will come to Boston; if you think best, get a box in the Union Safe Deposit. Below is my order to

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sell, if you think proper; but I would rather keep the Union Pacifics, and hope for a rise after a time, of course. I will do as you think safest and best. You know I want to do as near as the doctor would if he were here, so I have to be very careful. I perceive, however, that it is necessary for you to have my order to sell, and, although I don't like the responsibility, I suppose I must take it. I am very much obliged to you for attending to my affairs so promptly, and if you will be kind enough to let me know when you make any change, I will be greatly obliged.

"Sell five thousand Union Pacific 6's. Mary E. Matthews."

"Boston, October 16, 1871. Mrs. Mary E. Matthews, New York. We have to-day sold the coupons in the five thousand Iowa bonds, and bought one thousand Iowa Equipment bond. C. E. Fuller & Co."

The bond mentioned in defendants' letter of October 16 was of the same kind as the other five above mentioned. These six bonds, with the five Union Pacific bonds, remained in the defendants' keeping until January 6, 1872, when the plaintiff's wife gave the following order to the defendants: "Boston, January 6, 1872. Messrs. C. E. Fuller & Co. Please exchange the balance of my Union Pacifics first-mortgage (5000) for Iowa Central first-mortgage 7% bonds. Mary E. Matthews." The defendants thereupon sold the five Union Pacific bonds then in their hands, and invested the proceeds, in five $1000 Central Iowas first-mortgage bonds, which they had for sale at 95.

The defendants also sent the plaintiff the following letter: "Boston, October 23, 1871. Mr. E. S. Matthews, Rio de Janeiro. Dear Sir: We have received your favor of September 4th, with enclosures as stated, and we have sold the draft of £101 10*s.* 6*d.* @ 8%, or 487.32 gold, and the draft for £50 @ 108¾, or 242.91 gold, which we sold at 114¾, crediting your account 837.94. We have also exchanged for you 5000 of the Union Pacific bonds for Iowas, leaving a balance in your favor of $63.20, and sold the coupons from the same for $198.62, making your account stand: [Then followed a statement of the account.] Mrs. Matthews did not wish to have all the U. P. bonds exchanged at that time, but as matters have turned, we are sorry that she did not, as there has been a great fire at Chicago, involving

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a loss of two or three hundred million dollars; in consequence of which, values are quite disturbed, and all railroads, that are any ways connected with Chicago, have experienced a great decline, and U. P. with the rest, while the Iowa road, being connected with St. Louis, is benefited by the disaster. Stock and bonds have recovered in a great measure from the decline, and soon probably will sell at the old figures. We think the exchange a first-rate one, and hope that Mrs. M. will decide to exchange the balance of the lot when she can realize the same price; as the Pacific bonds, though undoubtedly safe, have so much of a speculative nature, that you cannot rely upon the price; while the Iowa road is steadily increasing its business, and we think must take its place with one of the best managed and most prosperous roads of the West. We shall be most happy to hear from you at any time, and any business that you may send us will have our prompt attention. C. E. Fuller & Co."

It appeared that there was a monthly mail between New York and Rio de Janeiro, by steamer, and extra ones by way of England and Portugal; that the plaintiff and his wife corresponded, and received letters monthly from each other; that he was cruising on the coast of South America, but went into port monthly for the mails; and that he never missed a mail but for one day.

The plaintiff testified that he received the letter of October 23, 1871, and he produced the letters of the defendants to himself and wife, and put them in evidence with the letters of his own and those of his wife.

The bonds of the Iowa Central, in which the defendants invested as above, were mortgage coupon bonds. The defendants testified that these bonds could be registered on being sent to the office of the railroad company, the mode being by an indorsement thereon: "This bond is payable only to the order of —"

The plaintiff's wife testified that before the investment in the Central Iowa bonds was completed, she asked the defendants, if they were registered, and they replied that they could be registered; that she would have to send them to some one out West; and that they would collect the interest. As they would have to go out of her hands, she said she would not let them go, and nothing was done about it. She also said that she did not know

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what registered bonds were, and never knew there was any other way of registering bonds. She testified in cross-examination, that she wrote her husband what the defendants had done, truly as she understood it; but, on re-direct examination, that she did not write him that the bonds were not registered. The letters were not produced by the plaintiff, as all of their correspondence with each other had been destroyed by them.

It appeared that the Iowa Central bonds were left by the plaintiff's wife with the defendants, for safe keeping, until April 17, 1872, when she sent for and obtained them by express, upon her order, cut off two years' coupons and gave them to one Peirce, a broker or banker in Providence, for collection, and when she went to South America left the bonds with her father, who held them for her until the fall of 1874, when her husband returned from Europe. The last coupon paid in money of the first-mortgage bonds was the one due January 1, 1873; of the second, that due October 1, 1872. The subsequent coupons falling due were paid in scrip, or new unsecured bonds with coupons attached.

It also appeared that up to January 1873, the first-mortgage bonds kept up to ninety cents or upwards on a dollar, in the market, and that the second-mortgage bonds were sold by subscription only, at eighty-five cents on the dollar; that after January 1873, the first declined until they sold at fifty-three in June 1873; and, in January 1874, they sold at forty-six, and sales of the seconds ceased at about the same time; and that neither class of bonds has ever been of any higher value since.

It also appeared that the plaintiff was on a cruise between ports in Uruguay, Buenos Ayres and Brazil, until February 1874, and he testified that he was closely occupied in his duties; that his wife was in Uruguay about six months, between October 1872 and June 1873; that they were together there about two months; that during that time the yellow fever prevailed, and confined the plaintiff closely to his professional duties, and the remainder of the time of his cruise she was in the United States, that they corresponded monthly; that he returned to New York from Brazil in February 1874; that he left the ship, and was engaged in official business for a week or more; that his wife joined him, in pursuance of a telegram sent her to Providence,

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and they spent four or five days in New York together, she being ill, and he attending her as a physician; that he took her to Maryland, where she was too sick to attend to business; and that, while she was convalescent, he went to Europe for his own health; that he was gone two or three months, and returned, arriving in Providence in August 1874. He testified that he and his wife were on good terms when in South America; that he knew that the bonds had been bought; knew it from his wife; that it was a tabooed subject while she was in South America; that she grew very excited over it; that they had lost all confidence in the bonds, and considered them worthless when his wife was there; that he was sure of that from what an officer told him; that he regarded the bonds as worthless; that his wife was there six months; that he knew of the purchase of the Iowas; that he regarded the bonds as worthless from the time of the purchase; that he regarded them so from the time he heard they were bought in 1871 or 1872; that he learned of the purchase of Mrs. Matthews, and from the defendants; that he reached this conclusion in the autumn of 1871; that he did not write nor have communication with the defendants afterwards; that he wrote to his wife on the subject; that he did not know that he got an answer; that he did not write her again on the subject; that he formed his impression about the bonds from what he was told. He was asked what he was told, and said that the captain's clerk said to him, "You are a madman; you are crazy. Would n't leave a ten dollar bill with them. Reputation not worth a copper;" that the engineer told him the same things; that after that he took no pains to see if they were good; that he had the American papers, but did not know whether he looked at the stock lists; that his wife came home in 1873, he in 1874; that he had no communication with the defendants after he learned the condition of the bonds and came to this conclusion; that he did not go to see them nor communicate with them until November 1874, when, just before the commencement of this suit, he tendered back the Iowa Central bonds and the scrip or bonds taken for unpaid coupons, and demanded back the Union Pacific bonds through his counsel; and that he then went and got the bonds and gave them to his counsel for that purpose.

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The plaintiff introduced evidence tending to show that neither he nor his wife were informed, until after his return from Europe, that the defendants were agents of the Central Iowa Railroad Company for the sale of its bonds, or that the eleven Central Iowa Railroad bonds, when bought, were not registered. The defendants denied and controverted this by other evidence tending to show that he did know these facts all the time; that he had been in Boston about a year before he sailed, and had business dealings with them, and was fully informed of their relation to the company, and that they were selling the bonds for it; that they had tried to negotiate the exchange before he left. The plaintiff and his wife testified that he never instructed her to act in the sale or exchange of his bonds.

The defendants contended, and introduced evidence tending to show, that the company put said bonds upon the market in Boston, through them and other brokers, at fixed and limited prices for each class of bonds, the brokers being allowed and paid by the company an agreed commission; that they took pains to fully inform themselves in regard to the same, and believed in them as an investment; that, acting under their written authority, they sold the Pacific bonds and invested in the Iowas for the plaintiff in good faith, and in the exercise of their best discretion and judgment, and in all things with due fidelity, believing the exchange was judicious, and the new investments perfectly safe, and for the best interests of the plaintiff.

The plaintiff took no steps to repudiate the action of his wife, or of the defendants, in the premises until November, 1874, when, after consulting counsel, he made the tender and the demand through his counsel, as above stated. The defendants charged and took no commissions from the plaintiff for what they did.

The plaintiff sought to recover only the value of the Union Pacific bonds, or the money invested in the Iowa Central bonds, in repudiation of the investments made in the latter, and contended that the written instructions and authority limited the defendants to investing in registered bonds; that the investments made in the Iowas were not safe or proper; and that the Iowas were not registered bonds.

The judge, among other instructions covering the whole case, and not excepted to, instructed the jury as follows:

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"1. That by the letters, the defendants were not limited to investing in registered bonds, but that the matter was left to their judgment; and they must use their best judgment and make as safe an investment as they reasonably could; that permission to invest in Iowas did not relieve them from using their best judgment.

"2. That the defendants, being brokers or agents for the railroad company for the sale of the bonds, were bound to disclose the fact to the plaintiff; and if they failed to do so, and concealed it from the plaintiff and his wife, this would render them liable; but, if they did inform them of the fact, they were still bound to put the money in what they believed to be safe; that they did not do their duty if they took advantage to palm off Iowas, merely because they were agents for the sale, not believing in them.

"3. That the defendants were bound to use their best judgment, to act fairly, prudently and in good faith, and, if they did do so, they were justified in investing as they did.

"4. That if they failed to do their duty, the plaintiff had a right to repudiate the transaction upon learning the facts and becoming so satisfied; that if a broker, instructed to sell and invest in a certain way, sells and invests in a different way, the person can repudiate and call on the broker to respond, either the bonds, or for damages equal to the bonds and the money; that if the plaintiff chose to repudiate, he was bound to do it with reasonable despatch, upon learning the facts; that he could not, after obtaining the requisite knowledge, lie back for an indefinite period, taking his chances of the market, supposing the undertaking was to put the plaintiff's money in safe securities, or safe registered securities, as the plaintiff claims; that whenever he learned the facts and was satisfied that the defendants had violated their duty in not putting the money in a safe bond, the plaintiff's duty was to repudiate at once, not at the moment, but within a reasonable time.

"That the plaintiff had testified that he became satisfied, immediately after he heard of the investment, that the bonds were worthless, and that he had lost his money; that the subject was so painful to his wife that it was tabooed between them while she was in South America; and it was for the jury to say

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whether it was a fair inference from his testimony, that from the fall of 1872 he was in possession of knowledge that his instructions to the defendants had not been complied with, and that the transaction was one which he had a right to repudiate; if he was, and delayed for two years or more to repudiate the transaction, he must be regarded as having elected to accept it, unless the jury found from the evidence that there was such a state of facts, by reason of ill health, his local position, his duties or his inability to communicate with the defendants, as to prevent action on his part, or excuse the delay."

The jury, after retiring, returned and asked the judge for further instructions as to what was to guide them as to reasonable time for repudiation. The judge instructed them that it was the duty of a person desiring to repudiate, to do so at once after learning and being satisfied of the facts, that is, as soon as he reasonably could; that he has no right to delay for the purpose of taking his chances; that he must use reasonable despatch, considering the circumstances; that if there was a physical obstacle that could not be overcome, that was an excuse; but if it was his mere personal convenience, inattention or carelessness, it was not; that the jury must determine whether an unreasonable delay occurred under the circumstances and facts appearing in evidence.

The plaintiff then requested the judge to rule that reasonable delay may have resulted from the absence of the plaintiff from the United States. The judge read this request to the jury, but did not give the same in that language, instructing them only that they might take that fact into account, considering the frequency and means of communication, and his opportunities for notifying the defendants; and added that it was not necessary that he should be personally present to give the notice and tender back the bonds; that he might send to an agent to do it, and have it done through him, as was done, for instance, by his counsel, ultimately.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions to the refusals to rule as requested, and to all the instructions given which are reported, except the third.

T. L. Livermore, for the plaintiff. 1. It appears from the uncontroverted testimony of the plaintiff and his wife, that she had

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no authority to act in the sale or exchange of the bonds. The defendants must therefore rely on the authority as shown by the plaintiff's letter of August 25, 1871. The allusions in that letter to Iowa bonds, it is agreed, relate only to the first-mortgage bonds of the Central Iowa Railroad, while the defendants bought second-mortgage bonds. Moreover, the letter, fairly construed, authorizes the purchase of only registered bonds. Were it not for the last clause, no question could arise on this point, and this clause is a mere general expression which must be limited by the special authority previously given. 2 Rol. Ab. 409. *Moore* v. *Magrath*, Cowp. 9. *Sandiman* v. *Breach*, 7 B. & C. 96. *Browning* v. *Wright*, 2 B. & P. 13. *Rossiter* v. *Rossiter*, 8 Wend. 494. *Williams* v. *Higgins*, 30 Md. 404. Wharton on Agency, § 222.

2. The fourth instruction of the court alleges, as a matter of fact, that the plaintiff testified that he considered the Iowa bonds worthless; that immediately after he heard of the investment "he became satisfied the bonds were worthless and that he had lost his money." This omitted the material circumstance, that the plaintiff testified that he came to this conclusion from what an officer told him, which was, that he (the officer) "would n't leave a ten dollar bill with them. Reputation not worth a copper." This was said of the defendants, and excited merely a suspicion that they could not be trusted; but it did not give any definite information to the plaintiff concerning the good or bad faith of the defendants in this transaction nor concerning the value of the securities. Indeed, it was impossible for the plaintiff to have known anything against the bonds at this time, for this was in the autumn of 1871, and both classes of the Iowas kept up to the price for which the defendants exchanged them for the plaintiff, and interest was paid on them, until January, 1873, after the officer told the plaintiff of the defendants, and after the plaintiff's wife left America for Brazil.

A. A. Ranney, for the defendants, was not called upon.

ENDICOTT, J. The defendants sold for the plaintiff, under certain instructions, ten bonds of the Union Pacific Railroad, and invested the proceeds in bonds of the Iowa Central Railroad. The plaintiff contends that the instructions directed the defendants to change the Union Pacific bonds for registered bonds, that the Iowa Central bonds were not registered, and that

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the defendants did not act in good faith. The defendants contend that the instructions did not require them to invest the proceeds in registered bonds, that the defendants did act in good faith, and that the plaintiff, after knowing all the facts, neglected for more than two years to object to the transaction and thereby accepted and ratified it.

The presiding judge stated to the jury that the instructions, contained in the plaintiff's letters, did not limit the defendants to an investment in registered bonds, but the matter was left to their judgment; that they must use their best judgment, and make as safe an investment as they reasonably could, and that the permission given them by the plaintiff to invest in Iowa Central bonds did not relieve them from exercising their best judgment. He also instructed the jury, that the defendants were bound to act fairly, prudently and in good faith in the transaction. We see no ground of exception to these instructions.

The plaintiff does in his letters express a decided wish to have his money put into registered bonds, and says that he is anxious to do so, but after considering the subject at some length and giving no definite instructions, he concludes by saying, "I shall feel under many obligations if you will kindly make such sale and purchases of bonds as your good sense dictates."

It is urged as an objection to the fourth instruction to the jury, that the presiding judge stated, as matter of fact, "that the plaintiff had testified that he became satisfied, after he heard of the investment, that the bonds were worthless and he had lost his money," and omitted to state the ground on which the plaintiff said he came to this conclusion, respecting which he testified later in his examination. The instruction of the presiding judge is not open to this objection; for while he did not state in terms the ground on which the plaintiff came to that conclusion, the jury were also told "it was for them to say whether it was a fair inference from his testimony, that from the fall of 1872 he was in possession of knowledge that his instructions to the defendants had not been complied with, and that the transaction was one which he had the right to repudiate." The presiding judge did not tell the jury what was proved as matter of fact, but, after calling their attention to a statement

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of the plaintiff, left it for them to say, on all his testimony, whether he knew in 1872 that the instructions, he contended were given, had not been complied with. This was an important question for the jury to consider, if they found it necessary to determine whether the plaintiff, by failing to object for two years or more, had ratified the sale and purchase.

Exceptions overruled.

ATTORNEY GENERAL *vs.* CITY OF BOSTON & others.
JOHN A. LOWELL & others *vs.* SAME.

Suffolk. November 23. — December 19, 1877.

By the St. of 1852, *c.* 244, the East Boston Ferry Company was incorporated for the purpose of establishing and supporting a ferry between the main land in the city of Boston and the island of East Boston, and was allowed to collect and receive such tolls as the mayor and aldermen should determine; and the city of Boston was authorized, at any time during the continuance of the charter, to purchase the ferry and franchise of the company, and to issue scrip in payment therefor, and thereupon to collect the same rates of toll as were allowed to the company; provided that whenever the tolls collected should be sufficient to reimburse the city for the cost of the ferry, with annual interest on the scrip, and for all the expenses of the repairs and additions to the ferry, and all current and incidental expenses of its superintendence and its management, and to provide a sufficient fund for its future support, "then the tolls on said ferry shall cease, and said ferry shall ever after be maintained by said city of Boston as a free ferry." By the St. of 1869, *c.* 155, § 1, the city council, "for the purpose of improving private property, and of protecting the same and the travel and business between the main land in said city and East Boston from the disabilities and burdens of the ferry communications heretofore existing between said parts of the city, and of furnishing additional facilities to said travel and business," was authorized to purchase the ferry and franchise of the company, and to cause the ferry to be maintained "in such manner and upon such rates of ferriage as the board of aldermen of said city shall from time to time judge the best interests of the said city to require, excepting only as hereinafter provided." By the subsequent sections of this statute, the city council, "upon the completion of said purchase," was authorized to determine whether the interests of the city would be best promoted by maintaining the ferry free of tolls, either "thereafter" or "for a term of not less than ten years next succeeding said purchase;" and, if either of these alternatives was adopted, the board of aldermen was to adjudge whether East Boston, or any and what part thereof, would receive special benefit and advantage from the purchase, and provision was made for the assessment and levy of a portion of the cost upon the owners of real estate in the territory so adjudged to be benefited. In 1870, the city purchased the ferry, and maintained it for seven years afterwards at rates of toll

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fixed by the board of aldermen. *Held*, that the city council could not now determine to run the ferry free of toll.

If the city council of a city, authorized by statute to maintain a ferry at such rates of toll as the board of aldermen may from time to time determine, orders that the ferry be run free of toll on and after a future day, this court, on an application made before that day arrives, may, by a writ of mandamus to the city council, compel the city to continue to collect the tolls established by the board of aldermen.

If the city council of a city, authorized by law to maintain a toll ferry, illegally orders the ferry to be run free of toll, a writ of mandamus may be demanded by the attorney general.

TWO APPLICATIONS for a writ of mandamus to the city of Boston and to the board of directors for the East Boston ferries; the first by information of the attorney general, and the second by petition of ten citizens and taxpayers of Boston, and each containing the following allegations:

That by the St. of 1869, *c.* 155, "the city council of the city of Boston was authorized to purchase the boats, franchise and other property of the East Boston Ferry Company, a corporation maintaining and operating a steam ferry between Boston proper and East Boston, at such price as might be agreed upon, and to cause the said ferry to be maintained in such manner and upon such rates of ferriage as the board of aldermen of the city should from time to time judge the best interests of the said city to require, except only as in said act afterwards provided; that said act, by its second section, provided that, upon the completion of the purchase, the city council should consider and determine whether the interests of the city would be best promoted by maintaining said ferry thereafter free of tolls, and in case it should decide the same in the affirmative, that the said ferry should thereafter be maintained free of tolls, and that in such case the board of aldermen should adjudge and determine whether the territory of that part of the city called East Boston and Breed's Island, or any and what part thereof, would receive any benefit and advantage therefrom beyond that general advantage which would be received therefrom by other parts of the city, and what portion of the cost of such purchase should be borne by the city, and what portion by the owners of real estate in East Boston and Breed's Island; and further provided for the ascertaining, assessing and collecting betterments from said owners of real estate; that said act further provided, that

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If the city council, upon the completion of the purchase, should adjudge and determine that, instead of maintaining the ferry free of all tolls, it was for the best interests of the city that the ferry should be thereafter operated with more boats and greater facilities for travel and business, and at one cent ferriage for a foot passenger, instead of two cents as theretofore, and with the other rates of ferriage so reduced that the receipts of the ferry should not exceed the cost of operating the same, instead of paying, as provided by the charter of the company, at least eight per cent. annual dividends, then the city should maintain and operate said ferry with such greater accommodations and at such reduced rates, or with such other greater accommodations and at such more reduced rates of ferriage as the board of aldermen might judge expedient from time to time; and further provided for the assessment of a betterment not exceeding one half the cost of the purchase on the benefited estates; that said act further provided that if the city council, instead of adjudging to maintain the ferry free of all tolls, should adjudge and determine that it was for the best interests of the city that the ferry should be maintained free of tolls for a term of ten years next succeeding said purchase, and thereafter upon such rates of ferriage as might then be adjudged by the city, then the city should operate said ferry free of tolls for ten years, and might then assess a betterment as aforesaid not exceeding one half the cost of said purchase." *

* The first section of the St. of 1869, *c.* 155, is as follows: "The city council of the city of Boston, for the purpose of improving private property, and of protecting the same and the travel and business between the mainland in said city and East Boston from the disabilities and burdens of the ferry communications heretofore existing between said parts of the city, and of furnishing additional facilities to said travel and business, are hereby authorized to purchase the boats and so much of the other property, including the franchise, of the East Boston Ferry Company as they shall think expedient, at such price as may be agreed upon between them and the said ferry company, with the approval of the mayor of said city, and to ordain and establish the present or such other lines of ferry travel as they may see fit between the said parts of said city, and to cause the said ferry to be maintained thereon in such manner and upon such rates of ferriage as the board of aldermen of said city shall from time to time judge the best interests of the said city to require, excepting only as hereinafter provided."

The other provisions of that statute are sufficiently stated in the opinion.

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"That after the passage of said act, the city of Boston purchased the franchise and property of said East Boston Ferry Company for the sum of two hundred and seventy-five thousand dollars, the purchase to go into effect April 1, 1870, and has ever since maintained and operated said ferry.

"That on February 11, 1870, the city council passed an ordinance called 'An ordinance to establish a board of directors for the East Boston ferries,' providing for the election annually of a board of directors, who should hold their respective places until others should be elected to fill them, and giving said directors the general care and management of the East Boston ferries, and for that purpose giving them all the powers vested in the city council, so far as the same could be legally delegated; and further providing for the establishment of rates of toll, to be based on an income sufficient to cover the current expenses of maintaining the ferries, and the payment of the interest on the ferry scrip; and the petitioner asks leave to refer to said ordinance as printed among the ordinances of said city." Ordinances of Boston, (ed. 1876.) 293.

That on March 24, 1870, the board of aldermen fixed the rates of toll to be collected according to a schedule annexed, (in which the ferriage for each foot passenger was fixed at two cents,) "and the said tolls so fixed are now the lawfully established tolls which said city council and said ferry directors are bound by law to collect;" and that the present board of ferry directors consists of seven persons, whose names were given.

"That inasmuch as said city council, upon the completion of the purchase of said ferry, considered and determined whether the interest of the city would best be promoted by maintaining said ferry thereafter free of tolls, and did not decide the same in the affirmative, but on the contrary determined to impose tolls and to maintain the ferry as a toll ferry, under the management of a board of directors as aforesaid, the said city became thereupon bound to maintain the said ferry as a toll ferry, and to collect the tolls fixed or to be fixed by the board of aldermen as aforesaid, and that until other rates of toll shall be fixed by said board, it is the duty of the said city, and of the said ferry directors, by virtue of said statute and ordinance, to collect the tolls now established as aforesaid by said board of aldermen.

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"That the said city council, regardless of its duty to maintain said ferry as a toll ferry, and pretending that it still has, after the lapse of more than seven years since the purchase of said ferry, the power to establish a free ferry which was expressly given to them to be exercised only upon the completion of the purchase, did, on July 30, 1877, pass an order in the following terms, viz. 'Ordered, that on and after the first day of January, 1878, the tolls on the East Boston ferries be abolished, and the said ferries be run free to the public travel.'

"That the said statute of 1869, *c.* 155, so far as it purports to authorize said city to run said ferry free of tolls, is unconstitutional and void, and that said last-named order was passed without authority, and is wholly inoperative, illegal and void.

"That the said city of Boston and the said board of directors intend, in pursuance and under color of the supposed authority and requirements of said illegal order, to cease collecting tolls on said ferry on and after said January 1, 1878, and to maintain said ferry as a free ferry on and after that date, and to assess the whole cost of maintaining said ferry on the taxpayers of said city."

The information and the petition each prayed for an alternative writ of mandamus to the city of Boston, and to the board of directors for the East Boston ferries, commanding them to continue, after January 1, 1878, to collect the tolls established as aforesaid, or such other tolls as may be hereafter established by the board of aldermen of said city, according to law, or show cause why they should not do so.

The city of Boston and the board of directors for the East Boston ferries filed general demurrers to the information and petition respectively, and the cases were thereupon reserved by *Morton*, J., for the determination of the full court.

J. G. Abbott & E. R. Hoar, for the city of Boston.

W. G. Russell, (*G. Putnam, Jr.*, with him,) for the attorney general and the petitioners.

GRAY, C. J. These are applications for a writ of mandamus to compel the city of Boston (which in 1870 purchased and now holds the franchise and property of the East Boston Ferry Company) and the board of directors for the East Boston ferries (to which the city council has committed the general care and man-

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agement of the ferries) to continue to collect the tolls established by the board of aldermen upon those ferries. The respondents have filed general demurrers, thereby admitting all the facts alleged; and the prayer for a writ of mandamus to the board of directors having been waived at the argument, the matter to be determined is whether, upon the facts alleged and admitted, such a writ should be issued to the city of Boston.

The questions presented are of such public interest and importance, that they have, with the assent of counsel, been considered by all the judges, and the opinion now announced is the unanimous judgment of the whole court.

The main question is of the validity of the order passed by the city council on July 30, 1877, in the following terms: "Ordered, that on and after the first day of January, 1878, the tolls on the East Boston ferries be abolished, and the said ferries be run free to the public travel."

By the St. of 1869, *c.* 155, § 1, the city council was authorized to purchase the franchise, boats and other property of the East Boston Ferry Company, and to cause the ferry to be maintained "in such manner and upon such rates of ferriage as the board of aldermen of said city shall from time to time judge the best interests of said city to require, excepting only as hereinafter provided."

The subsequent sections of this statute offered to the choice of the city council three modes of proceeding. The first was that by § 2, "upon the completion of said purchase, the said city council shall consider and determine whether the interests of said city will be best promoted by maintaining said ferry thereafter free of tolls," and if this was decided in the affirmative, then the city was to maintain and operate "the said ferry thereafter free of all tolls;" and in such case the board of aldermen was to adjudge and determine whether East Boston and Breed's Island, or any and what part of them, would "receive any benefit and advantage therefrom beyond that general advantage which will be received therefrom by other portions of said city," and what portion of the cost of such purchase should be borne by the city and what portion by the owners of real estate in the territory so adjudged to be benefited; and by §§ 3, 4, provisions were

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made by which the latter portion of the cost should be assessed upon and collected of such owners of real estate.

The second mode was that, by § 5, the city council, "upon the completion of said purchase," might adjudge and determine that, "instead of maintaining said ferry free of all tolls, it is for the best interests of said city that the said ferry shall be thereafter operated with more boats and greater facilities for travel and business than are now furnished by said company, and at one cent ferriage for a foot passenger, instead of two cents as heretofore charged, and with the other rates of ferriage thereon so reduced that the receipts of said ferry annually shall not exceed the cost of operating the same, instead of paying, as provided by the charter of said company, at least eight per cent. annual dividends;" and in such case the city was to maintain and operate the ferry accordingly, "or with such other and still greater accommodations and at such more reduced rates of ferriage as the said board of aldermen may from time to time judge expedient."

The third mode was that, by § 6, the city council, "instead of adjudging to maintain said ferry free of all tolls, as provided in section two," might adjudge and determine "that it is for the best interests of said city that the said ferry shall be maintained free of tolls for a term of not less than ten years next succeeding said purchase, and thereafter upon such rates of ferriage as may then be adjudged by said city;" and in such case the city was to maintain and operate the ferry "for and during a term of not less than ten years next succeeding said purchase, free of all tolls, but in all other respects as provided by section five." In case of the adoption of the second or the third mode of proceeding, provision was made for assessing and levying not exceeding one half of the cost of the purchase upon the estates adjudged to be benefited.

By these provisions, the Legislature has unequivocally manifested its intention that the question whether the ferry, as maintained by the city, should be a free ferry, or a toll ferry, or for a certain time the one and afterwards the other, should be determined by the city council, once for all, as soon as the purchase should be completed. This appears, not only from the usual and natural meaning of the words "upon the completion of said pur-

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chase," "thereafter," and "for a term of not less than ten years next succeeding said purchase," and from the contrast of these words with the words "from time to time" in the clauses directing the board of aldermen to fix the rates of ferriage; but also from the provisions for ascertaining whether any territory is specially benefited, and for assessing and levying a part of the cost of the purchase upon the real estate in that territory. These provisions clearly show that the ferries are not to be made free, either permanently or temporarily, without assessing a part of the cost of the purchase on the owners of the estates which will receive a peculiar benefit therefrom; and that those owners, who are thus to bear a part of the cost, as well as the taxpayers of the city, who are to bear the burden of the rest, shall know at once the rule and measure of their liability.

It follows that the order by which the city council has undertaken to abolish the tolls, more than seven years after the completion of the purchase of the ferry, and when no portion of the cost can be assessed upon the estates specially benefited, is not within any authority which the second and subsequent sections of the St. of 1869 purport to confer.

Recurring now to the first section, it appears to us to be equally clear that the provision directing the city to cause the ferry to be maintained, "in such manner and upon such rates of ferriage" as the board of aldermen may from time to time determine, obliges the city to maintain the ferry as a toll ferry. The words "in such manner" are evidently used to signify only the way in which the ferry shall be practically run and carried on. If they had been intended to include the matter of tolls, the additional words "and upon such rates of ferriage" would have been wholly superfluous. To construe the words of this section as authorizing the city to abolish all rates of ferriage whatever would be a strained interpretation of the words themselves, and would contravene the general scheme and purpose of the Legislature as apparent upon a view of all the provisions of the statute.

The position that the order of the city council is justified by the original act of incorporation of the East Boston Ferry Company is equally untenable. That statute did authorize the city to purchase the ferry, and, after such purchase, "to collect and

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receive the same rates of toll as are allowed by the second section of this act to said company." But it was only when the tolls collected on the ferry should be sufficient to reimburse the city for the cost of the ferry, with the annual interest on the scrip issued by the city in payment of such cost, and for all the expenses of the repairs and additions to the ferry, and all current and incidental expenses of its superintendence and management, and to provide a sufficient fund for the future support of the ferry, that it was provided that "then the tolls on said ferry shall cease, and said ferry shall ever after be maintained by said city of Boston as a free ferry." St. 1852, *c.* 244, §§ 9, 11.

The conclusion to which we are brought by a consideration of the provisions of these statutes is confirmed by referring to the meaning of the word "ferry" at common law and in the earlier statutes of Massachusetts.

The definition of a ferry in the early books is "a liberty by prescription, or the King's grant, to have a boat for passage upon a great stream for carriage of horses and men for reasonable toll." Termes de la Ley (1st Am. ed.) 223. Jacob's Law Dict. Ferry. And according to all the authorities, English and American, the grant of a ferry, in its very nature, implies the taking of tolls by the grantee. Hale de Jure Maris, *c.* 2; Hargr. Law Tracts, 6. Woolrych on Ways, 217. Parke, B., in *North & South Shields Ferry* v. *Barker*, 2 Exch. 136, 149. 2 Dane Ab. 683, 684. *Fay, petitioner*, 15 Pick. 243, 249, 250. *Newburgh Turnpike* v. *Miller*, 5 Johns. Ch. 101, 112. *Aikin* v. *Western Railroad*, 20 N. Y. 370, 379, 386.

So far as we have been able to inform ourselves by a careful search, the only ferries known to the ordinances and statutes of Massachusetts from the first settlement of the Colony to the present time have been toll ferries. 1 Mass. Col. Rec. 81, 87, 88, 148, 241, 275, 304, 338, 341. 2 Mass. Col. Rec. 32, 90, 154, 244, 262. 4 Mass. Col. Rec. pt. i. 253, 296, 433; pt. ii. 103. Mass. Col. Sts. (ed. 1660) 28; (ed. 1672) 50; Anc. Chart. 110. Prov. Sts. 1694–5 (6 W. & M.) *c.* 16; 1710–11 (10 Anne) *c.* 1; 1711–12 (11 Anne) *c.* 8; 1724–5 (11 G. I.) *c.* 12; 1726–7 (13 G. I.) *c.* 14; 1728–9 (2 G. II.) *c.* 18; 1 Prov. Laws (State ed.) 188, 651, 683; 2 Prov. Laws, 340, 407, 519; Anc. Chart. 280 448. St. 1796, *c.* 42. Rev. Sts. *c.* 26. Gen. Sts. *c.* 47. Towns

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have sometimes been authorized to maintain ferries at places where no person would undertake to keep them, but only when judged necessary by the court of sessions or county commissioners, and at rates of toll established by them. Prov. St. 1760 (33 G. II.) Anc. Chart. 623. St. 1796, *c.* 42, § 4. Rev. Sts. *c.* 26, §§ 2, 7. Gen. Sts. *c.* 47, §§ 2, 6. As was said by Mr. Dane, "Thus, by statute law, our ferries ever have been and are established and kept up for a stated toll or fare." 2 Dane Ab. 684. The exemption of certain public officers, as by the colonial statutes, or of the inhabitants of particular places, by custom, from the payment of the tolls to which all others are subject, does not affect the character of a ferry. 4 Mass. Col. Rec. pt. i. 433. *Paine* v. *Partrich*, Carth. 191, 194.

It may also be observed, though hardly necessary to the present decision, that every grant from the sovereign authority is, in case of ambiguity, to be construed strictly against the grantee and in favor of the government, and is not to be presumed to confer rights or powers not clearly expressed or reasonably to be implied from its terms and from the nature of its subject. This rule has been freely applied to cases of grants by the Legislature to municipal or other corporations of interests or rights in or concerning ferries. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420. *Mills* v. *St. Clair County*, 8 How. 569. *Minturn* v. *Larue*, 23 How. 435. And it has been held that a city, authorized by its charter to build wharves on its own property, and to obtain by contract or purchase the title or the control of other wharves in the city, and to raise a revenue therefrom by establishing and collecting a rate of dockage and wharfage, had no power to take a lease of a wharf containing a provision that it should be kept as a free wharf. *Mobile* v. *Moog*, 53 Ala. 561.

As, for the reasons already stated, we are of opinion that the order, by which the city council has undertaken to abolish the tolls on the East Boston ferries, and to direct that they shall be run free to the public travel, is illegal and void, because it exceeds the powers which the statutes purport to confer upon the city, we are not required to consider the other and most important question, argued at the bar, whether it is within the power of the Legislature, under the Constitution of the Commonwealth, to authorize a city or town to establish and maintain a free ferry

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at the public expense, nor whether the provisions of the St. of 1869, *c.* 155, §§ 2–6, are constitutional and valid. If these provisions are unconstitutional, yet, being clearly separable and distinct, and never having been acted on by the city, they do not affect the validity of the grant of authority to purchase the ferry, contained in § 1 of the same statute, and in § 9 of the St. of 1852, *c.* 244.

The power of the Legislature under the Constitution to authorize a municipal corporation to maintain a toll ferry cannot, in the light of the long usage in Massachusetts, as shown by the statutes already referred to, be doubted. "The purpose of improving private property," mentioned in the St. of 1869, *c.* 155, § 1, as one of the reasons of the act, is not indeed a purpose for which a city can be authorized by the Legislature to expend money. *Lowell* v. *Boston*, 111 Mass. 454. *Loan Association* v. *Topeka*, 20 Wall. 655. But the mere insertion of those words in the preliminary clause in the nature of a preamble, which also fully states valid reasons for the enactment, in the purposes of protecting and facilitating travel and business between the two parts of the city, is not sufficient to warrant the court in declaring the whole section invalid.

The order of the city council being illegal and void, it is the duty of the city to continue to collect the tolls heretofore established, or which may from time to time hereafter be lawfully established by the board of aldermen, under the power conferred upon that board by the first section of the statute of 1869. To the suggestion that the aldermen may fix the tolls at nominal rates, it is a sufficient answer that they have not done so, and it is not to be presumed that they will, and that, until they do, the court has no occasion to consider whether such action on their part would be a lawful exercise of the power conferred upon them by the statute.

It is insisted by the learned counsel for the city that, assuming the order of the city council to be illegal and void, this court is powerless to restrain or control its operation before the time when it will by its terms take full effect. But this position appears to us to be unsupported by the authorities cited, and to be inconsistent with the very nature of the writ of mandamus, the power of issuing which is vested in the highest court of common

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law jurisdiction, and the proper office of which is to compel, not only inferior courts, but also officers and corporations, to obey and execute the laws, especially in matters of public concern, when no other equally effectual remedy is provided.

"The reason why we grant these writs," said Lord Hardwicke, when presiding in the King's Bench, "is to prevent a failure of justice, and for the execution of the common law, or of some statute, or of the King's charter." *The King* v. *Wheeler*, Cas. temp. Hardw. 99; *S. C.* Cunningham, 155. The same idea was more fully expressed by Lord Mansfield, as follows: "A mandamus is a prerogative writ; to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice. The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied." *Rex* v. *Barker*, 3 Burr. 1265, 1267.

This court, as the highest court of law of the Commonwealth, has as extensive powers and duties in this respect as the Court of King's Bench in England. The statutes which define its jurisdiction expressly declare that "the court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein, where no other remedy is expressly provided, and may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all other writs and processes to courts of inferior jurisdiction, corporations and individuals, necessary to the furtherance of justice and the regular execution of the laws." Gen. Sts. *c.* 112, § 3. See also Prov. St. 1699–1700 (11 W. III.) *c.* 3; 1 Prov. Laws, 371; Anc. Chart. 331; Sts. 1780, *c.* 17; 1782, *c.* 9, § 2; Rev. Sts. *c.* 81, §§ 4, 5. The granting of the writ of mandamus rests in the sound judicial discretion of the court, which has cautiously abstained from lay-

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at the public expense, nor whether the provisions of ... wer. 1869, c. 155, §§ 2–6, are constitutional and valid. ... Strong, visions are unconstitutional, yet, being clearly ... mission- distinct, and never having been acted on by ... Cush. 226, not affect the validity of the grant of auth... ss. 398. In ferry, contained in § 1 of the same statut... y well consti- of 1852, c. 244. ...y must neces-

The power of the Legislature un... ...r or subordinate thorize a municipal corporation t... ...g public authority in the light of the long usage ir... ...em. If they refuse tc statutes already referred to, ...em. In the former case by proving private property," ...andamus. And generally in all § 1, as one of the reaso... ...kes, where there is no other adequate which a city can be ... may be had to this high judicial writ. It money. *Lowell* v ... ministerial, but to judicial officers. In the for- v. *Topeka*, 20 ... contains a mandate to do a specific act, but in the words in the ... to adjudicate, to exercise a discretion, upon a partic- which also ... purposes ... subject. Neither the fact that the respondent is a municipal corpora- tween ... nor the fact that the board of aldermen has a discretionary cour... power to fix the rates of toll, affords any reason why the city should not be compelled by mandamus to perform the duty, im- posed upon it by law, of running the ferry as a toll ferry. In *East Boston Ferry Co.* v. *Mayor & Aldermen of Boston*, 101 Mass. 488, a writ of mandamus was issued on the application of the East Boston Ferry Company, before the purchase of the ferry by the city, to compel the mayor and aldermen to establish rates of toll in accordance with the St. of 1852, c. 244, § 2. And in *Attorney General* v. *City Council of Lawrence*, 111 Mass. 90, a writ of mandamus was issued to compel the two branches of a city council to meet in convention to elect a commissioner of streets, whose office was established only by a municipal ordi- nance which was subject to be repealed at any time by the city council.

It is said in Tapping on Mandamus, 10, cited for the respond ent, that "a mandamus will not be granted in anticipation of a defect of duty or error of conduct." But the only reference of the learned author in support of this proposition is to *Black- borough* v. *Davis*, 1 P. Wms. 48; and an examination of that

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case shows that the passage referred to was but a remark of counsel, not assented to or acted upon by the court.

The case was this: A man had died intestate, leaving as his next of kin a grandmother and an aunt, and the Prerogative Court had granted administration to the grandmother, but had made no order of distribution. An application was made in the King's Bench for a writ of mandamus to the judge of the Prerogative Court, commanding him to direct distribution to the aunt as well as the grandmother. It was argued by counsel that no mandamus would lie to compel payment to legatees or to those entitled as next of kin under the statute of distributions. To this Lord Holt answered: "If the ecclesiastical judge act contrary to law, may not this court oblige him to pursue the law? Is there any difference betwixt granting a prohibition to stop them from going wrong, and a mandamus to guide them right?" It was further argued for the respondent, "No mandamus ought to go, at least till the court have erred, for this court will not anticipate the judgment of the spiritual court;" or, as stated in another report, "Where a judge below is to give judgment, and it is not yet known which way he will judge, to command him beforehand to do his duty is very odd." But Lord Holt, disregarding the suggestion, said: "I would fain know how it comes to pass, that the spiritual court have not pursued the ancient civil law, but have varied that by the Novels?" "If the spiritual court, since the statute of Car. II., shall attempt a distribution contrary to the rules of the common law, we will prohibit them; for, by that statute, they are restrained to the rules allowed among us." And, after advisement, the court decided the case upon its merits, and refused the writ of mandamus, solely because the grandmother was nearer of kin to the intestate than the aunt. *Blackborough* v. *Davis*, 1 P. Wms. 41, 47–53; *S. C.* 12 Mod. 615, 621–626.

In the only other English case cited for the respondent, the master of a hospital, having refused to affix the common seal to the presentation of a person to a living, who had been elected by the majority of the corporation, was compelled by writ of mandamus to do so, although no deed of presentation had been tendered to him; and this, not on the ground that the tender had been waived, "but because that which the master was called

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on to perform was so simple." *The Queen* v. *Kendal*, 1 Q. B. 366, 386 note; *S. C.* 4 Per. & Dav. 603, 606.

The passage cited for the respondent from High on Extraordinary Remedies, § 12, substantially accords with the statement of Tapping, above quoted. But the only cases there referred to are from Maryland, Kansas and Louisiana, and differ so widely from the case before us that we need not consider whether they were well decided. In the cases in Maryland and in Kansas, the only day when the respondents could by law act upon the subject in question had either passed or had not arrived when the writ of mandamus was applied for. *Commissioners of Schools* v. *County Commissioners*, 20 Md. 449. *State* v. *State Canvassers*, 3 Kansas, 88. The cases in Louisiana were attempts by a creditor of a municipal corporation, or of the state, to secure a priority by writ of mandamus to its treasurer to pay the debt of the petitioner; and the writ was refused, in the one case, because it appeared by the record that the proceedings were fictitious and collusive, and, in the other, because the treasurer had not received the money and could not therefore be in fault in not paying it. *State* v. *Burbank*, 22 La. Ann. 298. *State* v. *Dubuclet*, 24 La. Ann. 16.

Applications for writs of mandamus being addressed to the sound judicial discretion of the court, the circumstances of each case must be considered in determining whether a writ of mandamus shall be granted; and the court will not grant the writ, unless satisfied that it is necessary to do so in order to secure the execution of the laws. But when the person or corporation against whom the writ is demanded has clearly manifested a determination to disobey the laws, the court is not obliged to wait until the evil is done before issuing the writ.

In the case of *The King* v. *The Lord of the Hundred of Milverton*, 3 A. & E. 284, a court leet was proved to have been held, as long as the deponents could recollect, in October annually, and to have been held by the present lord in October 1833. He had been requested to hold a court in October 1834, and had taken no steps in consequence of the request, but did not appear to have expressly refused to hold the court. An application to the court of King's Bench on November 24, 1834, for a writ of mandamus to compel the holding of the court, was op-

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posed by Sir William Follett, upon the ground that the court could only be held in October, and that "the utmost that could be done would be to compel the holding of the court in October next; but as the lord has not absolutely refused, that cannot be done in the present case"— clearly implying that, if he had absolutely refused, it could be done. Sir Frederick Pollock replied, "Practically, the question is, whether this court leet is ever to be held at all; for if the court will not grant the mandamus to hold at the proper time, before that time arrives, and if, after the time has past, the mandamus cannot be granted to hold at any other time, there are no means of enforcing the performance of the duty, and the objection would destroy the general power of this court to enforce the holding of courts leet by mandamus." The court, simply observing that it was doubtful whether any charter or prescription existed, limiting the time, and that such a limitation could not be assumed, and that great public inconvenience might accrue if a mandamus were refused on such grounds, ordered the writ to issue.

In *The Queen* v. *Eastern Counties Railway*, 10 A. & E. 531; *S. C.* 2 Per. & Dav. 648, and 4 Per. & Dav. 46; it was held that a railway company which had purchased lands and begun works on a part only of the line authorized by its charter, and which, as the affidavits showed reasonable cause for believing, intended to abandon the rest of the line, might be compelled by mandamus to complete its line, although the application for the writ was made long before the expiration of the time allowed by act of Parliament for such completion. See also *Attorney General* v. *Birmingham & Oxford Railway*, 4 De G. & Sm. 490, 498. To the same effect were the decisions of the Queen's Bench in *The Queen* v. *York & North Midland Railway*, 1 E. & B. 178, *The Queen* v. *Lancashire & Yorkshire Railway*, 1 E. & B. 228, and *The Queen* v. *Great Western Railway*, 1 E. & B. 253. The judgments in the Exchequer Chamber in 1 E. & B. 858, 873 note, 874, which reversed some of these decisions, went upon the ground that the acts of Parliament in question had not imposed any obligation upon the defendants, without touching the point that, if they had, a writ of mandamus might be applied for before the time had expired. *Edinburgh, Perth & Dundee Railway* v. *Philip*, 2 Macq. 514, 526.

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In *Welb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642, commissioners were incorporated by act of Parliament for the purpose of improving a town, and were empowered to levy rates, to borrow money, and to issue debentures. A holder of such debentures moved for a mandamus to compel the commissioners to apply their funds in payment of the interest thereon. It was objected that rates might not be levied, and that the form of the mandamus should have been to levy rates out of which to pay the interest on the debentures. But the court held that the mandamus should issue as prayed for, and said that if the commissioners should not levy rates, the petitioner would be entitled to another mandamus to compel them to do so.

In a very recent case in this court, a statute authorizing the city of Boston, for the purpose of abating a public nuisance, to raise the grade of lands in a particular district, and to assess the expense thereof upon the owners of the lands, provided that any person entitled to any estate in such land, and dissatisfied with the assessment, might give notice to the city council, and thereupon the city should take his land, and within sixty days thereafter file in the registry of deeds a description thereof, together with a statement that it was taken under the statute, which description and statement should be signed by the mayor, and the title to the land so taken should vest in the city. The owner of an estate in such land, being dissatisfied with the assessment, gave notice accordingly and offered to surrender his estate to the city. The city council neglected to take it, and passed an order vacating the assessment. The owner applied for a writ of mandamus to the city council and to the mayor, both of whom in their answers relied on the order vacating the assessment. It was held that, as soon as the assessment was made, the owner had the right to surrender his estate, and the city council could not afterwards vacate the assessment; and that the mandamus should issue, not only to the city council to take the land, but also to the mayor to sign the description and statement, although he could not do so, or be in default for not doing so, until the city council had passed an order taking the land, and although he might by the statute sign the description and statement at any time within sixty days after the taking. St. 1873, *c.* 340, §§ 1–4. *Farnsworth* v. *Boston*, 121 Mass 173.

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It is argued that it does not appear that the city has been requested and has refused to do the act sought to be enforced, and that therefore the writ of mandamus should not be issued. But, as Lord Denman observed, it is not necessary that the word "refused" or any equivalent to it should be used, "but there should be enough to show that the party withholds compliance and distinctly determines not to do what is required." *The King* v. *Brecknock & Abergavenny Canal*, 3 A. & E. 217, 222; *S. C.* 4 Nev. & Man. 871. See also *The King* v. *Lord of Milverton*, above cited; *The King* v. *East India Co.* 4 B. & Ad. 530; *The King* v. *Archdeacon of Middlesex*, 3 A. & E. 615; *S. C.* 5 Nev. & Man. 494; *The Queen* v. *St. Margaret's Vestry*, 8 A. & E. 889; *S. C.* 1 Per. & Dav. 116; *Maddox* v. *Graham*, 2 Met. (Ky.) 56. As a general rule, indeed, there must have been an express demand of that which the party moving for the writ desires to enforce. Tapping on Mandamus, 283, 284. *United States* v. *Boutwell*, 17 Wall. 604, 607. But where a municipal corporation or board has distinctly manifested its intention not to perform a definite public duty, clearly required of it by law, no demand is necessary before applying for the writ. *Commonwealth* v. *Commissioners of Allegheny*, 37 Penn. St. 237. *State* v. *Common Council of Rahway*, 4 Vroom, 110.

In the present case, the city of Boston, after purchasing the ferry, and running it as a toll ferry according to law for seven years, has then, by vote of both branches of the city council, ordered that on the first day of January next the tolls on the ferries shall be abolished and the ferries run free to the public travel. This order, unless controlled by the process of this court, will go into operation without further action on the part of the city, and shows such a deliberate assertion of an authority not conferred by law, and determination not to perform the duties required of the city by the statutes of the Commonwealth, as to make a peculiarly strong case for issuing a writ of mandamus.

It is finally contended that neither the attorney general nor ten citizens and taxpayers of Boston have the right to invoke the interposition of the court. To maintain this position would be to declare that the wrong committed by the city, in violation of its public duty and to the injury of a great number of citizens, is without remedy.

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A ferry is *publici juris*, and cannot be created without a license from the state, and is a thing of public interest and use. Hale de Jure Maris, *c.* 2; Hargr. Law Tracts, 6. *Blissett* v. *Hart*, Willes, 508, 512 note. *Huzzey* v. *Field*, 2 C., M. & R. 432, 440; *S. C.* 5 Tyrwh. 855, 866. *Pim* v. *Curell*, 6 M. & W. 234. The city being required by law to run the ferry as a toll ferry, it is not for the court to consider whether the ferry can be as well maintained by the city in violation of law as a free ferry, without the aid of the tolls which it is its duty to collect. We can have no doubt therefore that the attorney general, as representing the public, may properly institute this proceeding. *Wellington, petitioner*, 16 Pick. 87, 105. *Attorney General* v. *City Council of Lawrence*, 111 Mass. 90. *People* v. *Collins*, 19 Wend. 56, 65. *State* v. *Wilmington Bridge*, 3 Harrington, 312. *Sanger* v. *County Commissioners*, 25 Maine, 291. *People* v. *Regents of Michigan University*, 4 Mich. 98. *Heffner* v. *Commonwealth*, 28 Penn. St. 108, 112. *State* v. *Hartford & New Haven Railroad*, 29 Conn. 538.

The learned counsel for the city rely on *Attorney General* v. *Salem*, 103 Mass. 138, as conclusive against the application of the attorney general. But nothing was adjudged in that case, which supports the position. The decision there was that the failure of the city of Salem to establish, as required by statute, such rates, for the use by its citizens of the water supplied by the waterworks constructed by the city, as to pay the interest upon the cost of constructing and the expenses of operating those works, was neither such a usurpation of a franchise as would support an information in the nature of a quo warranto, nor such a public wrong as entitled the attorney general to maintain an information in equity. The question whether he could apply for a writ of mandamus was not before the court. The remark in the opinion, that the grievance complained of was not a public wrong in which every subject of the state was interested, and therefore could not be redressed by a public prosecution or proceeding, went beyond what the decision of the case required, and is not quite accurate. If the water rates had been collected and misapplied by the city, there would have been such a misappropriation of trust funds held by the city for a public charitable purpose, as would have supported an informa-

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tion in equity in the name of the attorney general. *Attorney General* v. *Dublin*, 1 Bligh N. R. 312. *Attorney General* v. *Liverpool*, 1 Myl. & Cr. 171, 201. *Jones* v. *Williams*, Ambl. 651. *Vidal* v. *Girard*, 2 How. 127, 189, 190. *Drury* v. *Natick*, 10 Allen, 169, 178. The point decided, as already observed, was only that the case did not show such a public wrong as could be redressed by information in equity; and the true ground upon which that decision rests is, that, when no misapplication of funds held upon a public trust and no nuisance to the public are shown, the appropriate remedy to compel performance of a duty imposed upon a corporation by statute is not by decree in equity, but by writ of mandamus at common law. *Attorney General* v. *Reynolds*, 1 Eq. Cas. Ab. (3d ed.) 131. *Attorney General* v. *Birmingham & Oxford Railway*, 4 De G. & Sm. 490, 498, and 3 Macn. & Gord. 453, 462. *Adams* v. *London & Blackwall Railway*, 2 Macn. & Gord. 118, 133. *Leominster Canal* v. *Shrewsbury & Hereford Railway*, 3 Kay & Johns. 654, 673. *Attorney General* v. *Tudor Ice Co.* 104 Mass. 239.

There is a great weight of American authority in favor of the doctrine that any private person may move, without the intervention of the attorney general, for a writ of mandamus to enforce a public duty not due to the government as such. *Union Pacific Railroad* v. *Hall*, 91 U. S. 343, 355, and cases cited. And in the analogous case of a writ of prohibition it is settled by modern decisions in England, that, when an inferior court is clearly exceeding its jurisdiction, a writ of prohibition may be issued upon the application of any person, even a stranger to the proceedings below. *Forster* v. *Forster*, 4 B. & S. 187, 199. *Mayor of London* v. *Cox*, L. R. 2 H. L. 239, 280. *Worthington* v. *Jeffries*, L. R. 10 C. P. 379. *Chambers* v. *Green*, L. R. 20 Eq. 552.

In the matter now before us, it is unnecessary to pass upon the right of the citizens and taxpayers to apply for a writ of mandamus; because, when the attorney general is entitled to apply and does apply for the writ, it is fit that the proceeding should be under his control rather than under that of private prosecutors; and, for the reasons already stated, upon his application it must be ordered that an

Alternative writ of mandamus issue.

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JOHN B. TOZIER & another *vs.* RENNEY CRAFTS.

Hampden. Sept. 26, 1877. — Jan. 8, 1878. ENDICOTT & LORD, JJ., absent.

In an action for liquors sold and delivered, to which the defence was that the goods were sold to a third person, there was evidence that the defendant told the plaintiff's agent that he had bought a billiard-saloon, and was going to put the third person in to run the place; that the latter would want some liquors and he wished some might be sent, and ordered the liquors; that the third person in fact ran the place and appeared to do all the business there; there was also evidence, admitted under the defendant's exception, that afterwards the third person told the agent that the defendant had given him authority to buy stock for the saloon, and asked the agent to write at once to the plaintiff to hurry up the liquors previously ordered; that the agent thereupon wrote a letter containing a copy of the order which he had previously received from the defendant, in which the defendant's name appeared as the person ordering the goods, and the letter was produced and admitted in evidence, although it had not been read by the third person. *Held*, that there was sufficient evidence that the third person was the agent of the defendant, and that the letter was admissible in evidence.

In an action against A. for goods sold and delivered, to which the defence was payment by the negotiable promissory note of B. and C., it appeared that the plaintiff took the partnership note of B. and C. in payment. *Held*, that the declarations of one of the partners, to the effect that A. was a member of the firm, were admissible in evidence to show that the plaintiff took the note under a misapprehension, and that, if this were so, the action could be maintained.

CONTRACT for goods sold and delivered. Answer: 1. A general denial; 2. That the goods were sold to Howard Crafts and Judson Crafts, doing business under the firm name of Crafts Brothers; and that they paid for the same by their notes.

Trial in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions in substance as follows:

W. D. Vietts testified, for the plaintiffs, that he was their agent in selling liquors; that a few days before October 10, 1873, he saw the defendant at Holyoke, and the defendant told him that he had bought out a billiard-room, and was going to put his brothers in to run the place; that they would want some liquors, and he wished some might be sent; that he then ordered certain liquors, being the goods in question, and directed them to be sent to him; that the brothers did in fact run the place, and appeared to do all the business of the saloon; that on October 10, 1873, he saw one of the defendant's brothers at Hartford, who told him that the defendant had given his brothers author-

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ity to act as his agents in purchasing stock in the business, and asked him to hurry up the goods ordered previously by the defendant; that the brother also said he wished the witness would write to his principals in New York at once, for the goods; that the witness wrote at the brother's request. The letter was produced, and it contained an order for liquors, (which the witness testified were the same ordered by the defendant,) and named the defendant as the person to whom the liquors were to be sent. There was no evidence that the defendant or either of his brothers read the letter, or heard it read before it was sent, nor was there any evidence to show that the defendant or either of his brothers saw the letter after it was written, except that it was in the presence of the brother requesting it.

The defendant objected to the admission of the letter, and of the conversation with the defendant's brother, but the letter and the testimony in regard to the conversation were admitted.

Vietts also testified that on November 29, 1873, he visited the saloon in Holyoke, and saw the defendant's brothers, and asked for a settlement of the bill; that one of the brothers wrote a promissory note, for part of the amount due, payable in ten days, signed it "Crafts Brothers," and handed it to the witness. For the purpose of showing fraud in the giving of the note, and to show that this note and another subsequently given did not constitute payment of the bill, Vietts was asked to state what was said when the first note was given, and, against the defendant's objection, was allowed to state that, on receiving the note, he asked why it was signed in that way, and was told by one of the brothers that the defendant was one of the firm of Crafts Brothers. Vietts also testified that attempts had been made to collect the note; that it had been put in a bank for collection and had been protested; and that on December 26, 1873, another note, signed "Crafts Brothers," was given for the amount of the first note and the balance of the bill, payable on demand. The defendant gave the plaintiffs notice to produce the notes at the trial, and they were produced and put into the case without objection. There was no evidence that either note had been returned to Crafts Brothers or to the defendant.

It appeared that the defendant lived a mile and a half from the saloon, and did not personally attend to it; and it was con-

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ceded that he was not in fact a member of the firm of Crafts Brothers. The defendant also put in evidence tending to show that he never ordered the goods, never directed that they should be charged to him, never had them, and did not agree to pay for them; and that one of his brothers was the owner of the stock in trade at the saloon. He also denied giving authority to his brothers to purchase goods on his credit.

The jury returned a verdict for the plaintiffs for the full amount of their bill; and the defendant alleged exceptions.

E. W. Chapin, for the defendant.

G. M. Stearns, for the plaintiffs.

AMES, J. The objections taken by the defendant to the admission of the letter to the plaintiffs from their agent, Vietts, do not appear to us to be well founded. The letter was not used as a substitute for an original order, or as a copy of an original entry or memorandum. It was not secondary evidence in any proper sense of that term. It was not offered for the purpose of proving that a contract had been made between these parties at some previous time, and entered in the order-book, but as independent evidence that the defendant, by the terms of the letter, ordered certain liquors to be furnished to him by the plaintiffs, which, in pursuance of that order, they did afterwards furnish. That is to say, it was offered as an original communication from him, or with his sanction and authority. If so, the fact that the substance of the same order had previously been entered in a book was entirely immaterial.

The question then arises, was it his letter; or, in other words, was there any evidence in the case which would justify the jury in finding that it was written on his behalf, and with his authority and consent. There was evidence that the defendant made a declaration to Vietts to the effect that he, the defendant, had "bought out" a billiard-room and "was going to put his brothers in;" that they were to "run the place;" that they would want some liquors, and that he wished some might be sent. His brothers afterwards occupied the place, and appeared to do all the business of the saloon. The jury might have found upon this evidence that the two brothers were his agents, and that, when he said that he intended to put them in the saloon which he had bought and to have them "run the place," he

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meant to be understood that it was his saloon, under their management and superintendence. There was oral evidence tending to show that these liquors had been bespoken by the defendant for the supply of that place. If the jury were satisfied that these brothers were agents of the defendant to procure such supplies, then the act of one of them, requesting Vietts to write to the plaintiffs at once for the liquors, was an act within the scope of his agency. The witness having testified that in compliance with the request he wrote the letter, and that the order contained in the letter was in accordance with the order previously given by the defendant in person, it was immaterial whether the brother of the defendant read the letter and knew its contents or not. Upon proof of the agency, the letter and the conversation which Vietts had with the defendant's brother at Hartford were admissible. It does not appear from the bill of exceptions what the instructions of the presiding judge upon this point were, but the excepting party fails to point out any particular in which they were erroneous, upon the general question of agency.

The evidence as to the conversation and declarations of the defendant's brother, to the effect that the defendant was a member of the firm of Crafts Brothers, was offered, not to prove that he was in fact a member of that firm, but merely to show he was so represented to the plaintiff. This evidence was admissible to account for their acceptance of the notes, and to rebut the presumption that they were to be considered as a payment of the account. It was competent evidence to show that the plaintiffs acted under the influence of a misrepresentation, and did not intend, by accepting the notes, to release the defendant and substitute other persons in his place. If such were the case, the production and surrender of the notes at the trial would entitle the plaintiffs to claim upon the original account for goods sold and delivered, as if no such notes had been given. *French* v. *Price*, 24 Pick. 13. *Melledge* v. *Boston Iron Co.* 5 Cush. 158. *Tucker* v. *Drake*, 11 Allen, 145. *Shaw* v. *Methodist Episcopal Society in Lowell*, 8 Met. 223. *Exceptions overruled.*

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EUGENE COLTON *vs.* E. T. RICHARDS.

Hampden. Sept. 25, 1877. — Jan. 30, 1878. ENDICOTT & LORD, JJ., absent.

In an action by a workman against his employer, for personal injuries caused by the fall of a staging, upon which the plaintiff was at work as a mason erecting a mill, the evidence tended to show that the staging was erected by fellow workmen of the plaintiff, out of material furnished by the defendant; that the staging was insecure by reason of a small piece of defective timber, called a putlog, on which the floor of the staging rested, and which had been in use by the defendant about two years; that the material for the staging was lying on the ground in piles near the building, and, from the mass, persons, who were afterwards the fellow workmen of the plaintiff, selected such material as they wanted, including the putlog in question; that some of the workmen were journeymen whose trade it was to learn to build safe and proper staging, and that they superintended the erection of this staging. The judge instructed the jury that the plaintiff could not recover unless the jury were satisfied that the defendant did not exercise ordinary care in the selection of men and materials to erect the staging, and that such want of ordinary care caused the accident; and that, if the defendant was to furnish a staging as a completed structure, he was to use such care in so doing as any person of ordinary prudence would use in providing such a structure; and that if he was only to furnish material, or to furnish this putlog as a manufacturer's utensil, he was to use ordinary care in so doing. The judge also, at the request of the defendant, further instructed the jury that if the defendant employed competent men to take charge of the erection of this building and of the necessary staging, and furnished suitable material for building the staging, out of which material a fellow workman, not under the superintendence of the defendant or his agent, selected a defective putlog which broke after the staging was erected, by which the plaintiff was injured, the defendant was not liable; and that the defendant was not liable if he used ordinary care and prudence in the selection of competent workmen and materials, from which the staging was made. *Held*, that the plaintiff had no ground of exception.

TORT for personal injuries caused by the fall of a staging, upon which the plaintiff was at work in the employ of the defendant. At the trial in the Superior Court, before *Bacon*, J., the plaintiff introduced evidence tending to show that he was employed by the defendant to work as a mason in the erection of a mill; that, a staging being needed to work upon, the defendant sent to the building a lot of material to be used therefor, and that the staging was put up by the fellow workmen of the plaintiff. There was evidence that the plaintiff aided in putting up the staging, but he denied it; that the plaintiff went to work upon the staging after it was up, when a putlog (a piece of timber that runs

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from the outer ledge of a staging to a building, and on which the floor of a staging rests) broke, and he was thrown to the ground and received the injuries complained of; that this putlog had been in use by the defendant for about two years, and was defective by reason of one or more knots. The evidence was conflicting as to the number of the knots and ease of discovery of the defect. There was also evidence that the defendant had a large amount of staging material in a pile; that he went with a teamster to the pile, and directed him to draw to this building from the pile what was needed for the staging at this building; that a quantity was drawn by the teamster, which was used at the building; that the building, on the day of the erection of the staging, was nearly completed, and the staging material was lying on the ground in piles; that the fellow workmen of the plaintiff took from the mass, as it chanced, such material as they wanted to make this staging, including the putlog in question; that some of the persons employed in the erection of the building were journeymen, and that it was part of their trade to learn to build safe and proper staging, and that they superintended the erection of this staging.

The plaintiff contended that it was the defendant's duty to furnish the plaintiff a staging as a completed structure, as an appliance and implement for use in his employment; and that a putlog was a defined, prepared, manufactured utensil, made and fitted to be used in the manner this was used, and for a defined and well known component part of a staging.

The defendant testified that the other putlogs in the pile from which the one in question was taken were sound and good.

The plaintiff asked the judge to instruct the jury as follows: "1. It is the duty of an employer to provide reasonably safe and proper material and implements for his workmen to work with and use, and his failure so to do is negligence. 2. If it was the duty of the defendant to provide for the plaintiff a completed staging as a structure, as an implement or appliance to carry on this work, then he was bound to see that the staging was a reasonably safe and strong one, and suitable to the work required of the plaintiff, and the fact that fellow workmen of the plaintiff used poor material furnished by the defendant, in the erection of such staging, is no defence. 3. If the putlog

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was a manufactured and completed implement or utensil, and was furnished by the defendant for the plaintiff's use, he is liable, even though it was put in use by the act of the plaintiff's fellow workmen."

The judge refused to give these instructions, and instructed the jury that the plaintiff could not recover, unless they were satisfied that the defendant did not exercise ordinary care in the selection of men and materials to erect the staging, and that such want of ordinary care caused the accident; and that, if the defendant was to furnish a staging as a completed structure, he was to use such care in so doing as any person of ordinary prudence would use in providing such a structure; and that, if he was only to furnish material, he was to use ordinary care in the selection of material; that if he was to furnish this putlog as a manufacturer's utensil, he was to use ordinary care in so doing.

There being evidence, which the defendant contended showed that he did not superintend the erection of the staging, the judge also instructed the jury, at the defendant's request, as follows:

"1. If the defendant employed competent men to take charge of the erection of this building and of the necessary staging, and furnished suitable material for building the staging, out of which material a fellow workman, not under the superintendence of the defendant or his agent, selected a defective putlog which broke after the staging was erected, by which the plaintiff was injured, the defendant was not liable. 2. The defendant is not liable if he used ordinary care and prudence in the selection of competent workmen and materials, from which this staging was made."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

G. M. Stearns, for the plaintiff.

N. A. Leonard & E. W. Chapin, for the defendant.

COLT, J. The plaintiff fell from an imperfect staging, while at work erecting a mill as a mason in the employ of the defendant. To maintain an action against his employer for an injury so caused, the plaintiff must establish some neglect of a duty on the part of the defendant, arising out of the relation between them, which was the direct cause of the injury. In this case, the only cause was the breaking of a small piece of imperfect

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timber, called a putlog, on which the floor of the staging rested. In all other respects, so far as it appears, the scaffolding was built upon a suitable plan, and, with the exception stated, of suitable materials.

The plaintiff contended that it was the duty of the defendant to furnish a staging for the plaintiff, as a completed structure, ready for use in his employment, or at least to employ suitable and adequate material for its construction. He also contended that the putlog was a prepared utensil, made and fitted to be used for a defined and well known purpose, which it was the defendant's duty to provide.

Upon these several points, the judge gave full instructions, which sufficiently covered the plaintiff's requests. These instructions stated the rule, that where the master undertakes to furnish suitable structures, appliances or materials, for the use of his servants in the performance of their work, or for the erection of the structures required in its performance, he is bound to use ordinary care only, whether he is to furnish a temporary staging as a completed structure, or the materials for the same, or only a single implement for use as a manufactured utensil.

Under these instructions, with nothing more, the jury must have found either that the defendant did not assume the alleged duty in any of the forms suggested, or that the duty, whatever it was, was faithfully performed.

After these instructions had been given, the court, at the defendant's request, further ruled, in substance, that if the defendant employed competent men to take charge of the erection of this building and of the staging necessary, and furnished suitable material therefor, he would not be liable, if a fellow workman, not under the superintendence of the defendant or his agent, selected a defective putlog, by the breaking of which the plaintiff was injured; and added, that the defendant would not be liable, if he used ordinary care and prudence in the selection of competent workmen and materials, from which the staging was made.

It is objected by the plaintiff that this last and additional sentence does not state the full measure of the defendant's duty, when, as master, he takes upon himself the business of furnishing a completed staging for the use of his workmen. In such

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case, it may indeed be true that the exercise of due care in selecting men and materials will not always satisfy the obligation assumed. It may still be his duty, especially when he superintends the work himself, to see that the completed structure is in itself reasonably safe and fit for the uses to which it is devoted.

But this last statement appears to have been only intended to apply to a case where the duty of the master did not include the building of the staging, but ended with the supply of materials. The judge had just told the jury that, if the defendant was to furnish a completed staging, he was bound to use such care as a person of ordinary prudence would use in providing such a structure. This was sufficiently definite in the absence of any request for more specific instructions. The plaintiff relied on the defendant's neglect of duty in several forms, as we have seen, and the instructions asked by the defendant, taken together, imply that they all refer only to that which related to the supply of suitable material for the work. They expressly refer in terms to the case where the plaintiff and his fellow workmen are employed, to take charge not only of the erection of the building, but of the necessary staging also, and where the defective timber is selected by a fellow workman, not working under the superintendence of the defendant or his agent. As applied to such a case, all parts of the instructions given at the defendant's request are correct and consistent; and the plaintiff's objection is not well taken. *Kelley* v. *Norcross*, 121 Mass. 508. *Arkerson* v. *Dennison*, 117 Mass. 407. *Ford* v. *Fitchburg Railroad*, 110 Mass. 240. See also *Allen* v. *New Gas Co.* 1 Ex. D. 251; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326.

A majority of the court are of opinion that the entry in this case must be *Exceptions overruled.*

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O. G. SPELMAN & others *vs.* THOMAS TALBOT & others, administrators.

Hampden. Sept. 25, 1877. — Jan. 31, 1878. ENDICOTT & LORD, JJ., absent.

Pending an action against several defendants, on a joint contract, one of them died, and judgment was recovered against the surviving defendants more than two years after letters of administration had been taken out on the estate of the deceased. This judgment was paid by all the judgment debtors except one, who was insolvent. *Held*, that they could not maintain a bill in equity for contribution against the administrators of the estate of the deceased.

BILL IN EQUITY, filed March 8, 1877, by O. G. Spelman, Lewis Bodman, Henry L. James, Joel Hayden and William Skinner, against the administrators of the estate of Joel Hayden, deceased.

The bill alleged that the defendants' intestate together with the plaintiffs and Alfred P. Critchlow and the Nonotuck Silk Company, by Lucius Dimock, executed the following instrument:

"Williamsburg, January 26, 1866. To J. E. Sheffield, esquire, Committee of the Northampton and New Haven Railroad Company. The undersigned, representing a large portion of business on the line of the proposed railroad from Northampton to Williamsburg, propose that, if your company will extend their road to Williamsburg as soon as practicable, we will undertake to secure good, responsible subscriptions to the stock of your company, to the amount of 1250 shares, and pay for the same in instalments, as needed for building the road. We also propose to secure the right of way for the road, free of expense to your company, from the westerly side of the town farm in Northampton to the western terminus of the road in Williamsburg, and also to obtain the needful legislation in Massachusetts to merge or consolidate the Northampton and Shelburne Falls Railroad Company with the Northampton and New Haven Railroad Company, so as to form one corporation from New Haven to Williamsburg. It is understood that this proposition is not to be binding on our part, unless we can secure the taking of the amount of stock above named, and also the right of way, or make such arrangement in regard to the same as shall be satis-

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factory to your company; also that the stock (1250 shares) is not to share in the earnings of the road until the extension is in operation."

That the New Haven and Northampton Company, having complied with the terms of the above instrument, was called upon to pay damages to the owners of land for the right of way taken by it for such extension of its railroad; that thereupon the corporation called upon the signers of the instrument to make good their agreement, which they refused to do; and that thereupon such signers executed another instrument, under which the corporation settled such claims, as follows:

"Williamsburg, August 13, 1867. To the New Haven and Northampton Company. The undersigned, whose names are subscribed to proposals submitted in January, 1866, to the New Haven and Northampton Company for them to extend their railroad to Williamsburg, hereby agree that said company may go forward and secure the right of way for said road west of Northampton town farm, either by purchase or appraisement by the county commissioners, as said company may think best, and that it shall be done without prejudice to the legal rights of either party named in said proposals."

That by writ dated in May, 1869, the corporation commenced an action in the Superior Court against such signers for breach of contract and for money paid by reason of such breach, which action was defended by the defendants' intestate and the other signers, and during the pendency of which on June 30, 1873, the following agreement, signed by the parties, was filed in the case:

"Judgment shall be rendered for the plaintiff as damages, as if upon a verdict, for three fifths of such sum as an assessor to be appointed by the court, unless agreed upon by the parties, shall find the plaintiffs have paid or are bound to pay for their right of way described in the contract, with interest thereon. Said assessors shall report each item, and the grounds of allowance or rejection, and shall also report any questions of law arising in the making of such assessment, if requested by either party, to this court, with right to take the same to Supreme Judicial Court. It is understood that the verdicts, awards and amounts paid shall be considered the value of the premises taken. Any outstanding claims in favor of the Nonotuck Silk

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Company against the plaintiff are agreed to be adjusted and paid by the said Joel Hayden and others, defendants in the above suit, but without prejudice to any claim said defendants may have on Lucius Dimock or said Nonotuck Silk Co. for contribution."

That on November 10, 1873, and during the pendency of said action, the defendants' intestate died, and on December 3, 1873, the defendants were duly appointed administrators of his estate, and gave due notice thereof, as required by law; that in June, 1875, the plaintiffs procured a summons to issue from said Superior Court to the defendants as administrators, to appear and defend the action, which summons was duly served, and at October term 1875, on motion of said administrators, the process was dismissed, as having been issued inadvertently and without authority of law, and exceptions alleged to such order were overruled by this court in January, 1876. [*New Haven & Northampton Co.* v. *Hayden*, 119 Mass. 361.]

That on June 28, 1876, the corporation obtained judgment in said action, in accordance with the terms of the agreement upon the assessors' report, dated June 18, 1876, against the plaintiffs herein and A. P. Critchlow, and on July 5, 1876, execution issued thereon for the sum of $24,144.14 damages, and $523.80 costs of suit; that the same was demanded of and was paid by the plaintiffs, equally, on July 7, 1876, with the sum of $41 interest, $3724.87 necessary expenses, and $3003.75, and interest from October 3, 1869, being the amount of judgment of that date in favor of the Nonotuck Silk Company, for damages against the New Haven and Northampton Company, assumed by the plaintiffs and the defendants' intestate, by the terms of the agreement; that A. P. Critchlow has paid no part of such sums, by reason of inability, and no part thereof is collectible against him; that the Nonotuck Silk Company was adjudged, upon the trial of the original action, not to be a party to the first above named instrument, and has paid no part of such sums; and that since the payments were made by the plaintiffs, they have demanded of the defendants contribution of their intestate's share thereof, which they have refused to pay.

The prayer of the bill was for judgment for the amount of the defendants' intestate's contributory share in the sums paid by

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the plaintiffs, and for general relief. The answer contained a demurrer for want of equity, and alleged that the plaintiffs remedy, if any, was at law.

Hearing before *Gray*, C. J., who made a decree, dismissing the bill for want of equity, and without prejudice to an action at law by the plaintiffs. The plaintiffs appealed.

H. B. Stevens, for the plaintiffs.

J. C. Hammond, for the defendants.

AMES, J. The various statutes, limiting the period of time during which executors and administrators are liable to be sued by the creditors of a deceased person, were plainly intended to secure the prompt and early settlement of estates. By the Gen. Sts. *c.* 97, § 5, this time is limited to two years after due notice has been given, as provided in the first section of the same chapter. Provision is made for the allowance of additional time in case of the discovery of new assets after the expiration of the two years. § 6. And there is a further provision to meet the case of a creditor having a claim which is justly due from the estate, but whose cause of action does not accrue within the prescribed term of two years. In this state of things the Probate Court may, upon examination, require the executor or administrator to retain in his hands sufficient funds of the estate to satisfy such claim. § 8.

A later statute, (St. 1861, *c.* 174, § 2,) which is relied upon by the plaintiffs, provides that any one who "has a claim against the estate of a deceased person, which has not been prosecuted within the time limited by law," may apply to this court by a bill in equity setting forth all the facts, and, if the court shall be of opinion that justice and equity require it, and that he "is not chargeable with culpable neglect in not bringing his suit within the time limited by law," the court may give him judgment against the estate of the deceased. But, even in that event, such judgment is not to disturb or affect any payments or distributions made before the commencement of such suit in equity.

The claim of these plaintiffs does not appear to us to fall within the purview of this statute. They have not been prevented by any accident or mistake from bringing a suit within the time limited by law. *Wells* v. *Child*, 12 Allen, 333. No fraud is suggested. The question of neglect, or of any excuse

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for neglect on their part, does not arise. They had no claim of any kind against the estate of the deceased, until the amount of their liability upon the suit against them was determined by a judgment against them, and until payment by them of that judgment. *Hayward* v. *Hapgood*, 4 Gray, 437. As the period fixed by law for the limitation of actions against his administrators had long before that time expired, they have never been in a position in which they had any legal claim at all against these defendants. Their possible liability upon their contract with the railroad company would not even give them a contingent claim upon the intestate's estate, upon which they could obtain an order from the Probate Court requiring the administrators to retain in their hands any funds of the estate to satisfy such claim. *French* v. *Hayward*, 16 Gray, 512. The statute on which the plaintiffs rely is intended to provide a remedy for a claim which might have been presented to the administrators for payment within the period of limitation, but which, without culpable neglect on the creditor's part, has failed to be so presented. The claim in this case was not one of that description, inasmuch as it did not come into existence until after the period had arrived at which the administrators of the deceased were relieved by law of all liability to suit in behalf of creditors of the estate. *Wood* v. *Leland*, 1 Met. 387. *Holden* v. *Fletcher*, 6 Cush. 235. *Bacon* v. *Pomeroy*, 104 Mass. 577. Whether the plaintiffs have or might have had a remedy against his legatees, distributees or heirs is a question not before us.

Decree affirmed.

COMMONWEALTH, by Commissioner of Savings Banks, *vs.* LANCASTER SAVINGS BANK, William H. McNeil & others, receivers, petitioners.

Worcester. Oct. 23, 1877. — Jan. 3, 1878. LORD & SOULE, JJ., absent.

The tax, imposed on savings banks, by the Sts. of 1862, c. 224, and 1868, c. 315, to be assessed annually on each bank, one half on the average amount of deposits for the six months preceding the first day of May, and the other half on the average amount for the six months preceding the first day of November, is an excise tax upon the value of the franchise of a bank on those days; and if on either day such

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bank is in the hands of receivers, and perpetually enjoined from doing business by a decree of this court, it is not liable to pay any part of the tax assessed on that day, although it has transacted business during a part of the six months preceding.

PETITION IN EQUITY, filed April 26, 1877, alleging that on December 22, 1875, the defendant corporation was temporarily enjoined from doing any further business; that on December 30, 1875, by a decree of this court, the injunction was made perpetual and the petitioners were appointed receivers to wind up the affairs of the corporation, and immediately entered upon the discharge of their duties; that the corporation was permitted to continue its organization only to do such acts as the petitioners in the performance of their duties might request of its officers in settling its affairs, and was deprived of the privilege of transacting the business for which it was incorporated and the right to use and exercise its franchise as a savings bank and of the profits and benefits to be derived therefrom; that the treasurer of the Commonwealth had called upon the corporation to make a return of the amount of its deposits on May 1, 1876, and of the average amount of its deposits for the six months preceding May 1, 1876, and claimed from the corporation the payment of a tax of three quarters of one per cent. under the St. of 1868, *c.* 315, on the amount of its deposits, to be assessed on the average amount of its deposits for the six months preceding May 1, 1876, and had made a demand upon the petitioners for the payment of such tax; and that the corporation had not made such return, nor had any assessment of such tax been made by such treasurer.

The prayer of the petition was for the instructions of the court, as to whether the claim was valid against the corporation or the petitioners, or whether the petitioners should pay the amount of the tax to the treasurer of the Commonwealth, or whether the corporation was now required by law to make the returns required by the St. of 1862, *c.* 224, §§ 8, 9, or liable to the penalties of § 11, and the St. of 1867, *c.* 52, for neglecting to make such returns or pay such taxes, or whether it was the duty of the president and treasurer of the corporation to make application to the petitioners for the use of the books of the corporation in their possession in making such return, or whether

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it was the duty of the petitioners to grant access to the books to such officers for that purpose.

Service was made upon the Attorney General, who appeared and admitted the truth of the facts stated in the petition; and the case was heard upon these facts by *Gray*, C. J., who made a decree that the corporation was not required to make such returns, and was not liable for the tax claimed by the treasurer of the Commonwealth, that the claim of the treasurer was not valid, and that it was not their duty to grant access to the books of the corporation to its officers to enable them to make such returns, and directing them not to pay the tax to the treasurer of the Commonwealth.

From this decree the Attorney General appealed to the full court.

E. A. Kelly, for the petitioners, was stopped by the court.

W. C. Loring, Assistant Attorney General, for the Commonwealth.

ENDICOTT, J. The Constitution of the Commonwealth provides, that the Legislature may impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the state. Const. Mass. *c.* 1, § 1, art. 4. A duty or excise may thus be exacted not merely upon certain articles produced or brought into the state, but also upon any commodities whatsoever. "Commodity" is a general term, and includes the privilege and convenience of transacting a particular business; and, upon persons carrying on such business, it has never been questioned that the Legislature may levy an excise, or provide that a license must be obtained in order to transact it. See Gen. Sts. *c.* 50. And, when a number of persons are incorporated by the Legislature for a special purpose, or, being incorporated by another state, have an office or place of business within the Commonwealth, upon the franchise thus conferred or exercised, an excise may be laid. *Portland Bank* v. *Apthorp*, 12 Mass. 252. *Attorney General* v. *Bay State Mining Co.* 99 Mass. 148. It is not a tax upon property, though the amount of the capital stock, or the extent of the business transacted, may properly afford the means of computing the amount of the tax. It was said by Mr. Justice Wells, in *Attorney General* v. *Bay State*

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Mining Co.: "In case of domestic corporations, it is based upon a valuation which involves an estimate of all the advantages, present and prospective, which the stock is supposed to derive from the combination of capital and the exercise of all the rights and privileges enjoyed by the corporation in the conduct of its business." Being a tax upon the privilege of transacting a particular business, it would seem necessarily to follow that if, at the time when the tax is to be assessed and is declared to accrue, the corporation has for the purpose of transacting its business practically ceased to exist and can no longer enjoy the privilege, then no tax is to be exacted.

By the statutes of this Commonwealth, savings banks are required to pay a tax of three quarters of one per cent. upon their deposits, to be assessed one half on the average amount of their deposits for the six months preceding the first day of May, and the other half in like manner preceding the first day of November of each year, and their officers are required to make return of the same on or before the second Mondays of those months. Sts. 1862, *c.* 224, §§ 4, 5, 8, 9, 11, 12; 1868, *c.* 315. The St. of 1862, was passed April 30 of that year, and the power of the Legislature to impose such a tax upon the franchise of savings banks, and the right to assess it on the average amount of deposits for the six months preceding the first day of May of that year, were upheld in *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428. The grounds upon which that decision was based are in the opinion of the court decisive of this case. It was there held that the excise was not laid on the property of the bank, or its depositors, or the business which the bank transacted during a given period, but upon the value of the franchise on the first day of May, or in other words, on its capacity to transact business on that day; and that the extent of its capacity on that day could properly be determined by the amount of its business during the preceding six months. That amount would disclose its capacity and the value of the privilege and benefit it enjoyed under its charter on the day when the tax was assessed. See *Commonwealth* v. *Provident Institution for Savings*, 12 Allen, 312. In the case at bar, the Lancaster Savings Bank was, by the decrees of this court, in December, 1875, placed in the hands of receivers, and perpetually prohibited

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from transacting the business for which it was incorporated, and deprived of the right to exercise its franchise, and of the profit and benefit to be derived therefrom. The receivers proceeded at once to wind up the affairs of the bank, and the organization of the bank existed only for the purpose of executing such deeds and papers as might be necessary to enable the receivers to perform their duties. Without considering the question whether the franchise could be said to exist on the first day of May following, it is very clear that as a privilege to transact business on that day it did not exist. Its officers could not be required to make return, and no tax could be levied as of May 1, 1876, under the existing provisions and law. See *Jones* v. *Winthrop Savings Bank*, 66 Maine, 242. If in December, 1875, there had been no statute imposing a tax on the franchise of savings banks, and in April, 1876, a statute similar to the St. of 1862, had been enacted, it would hardly be contended that it could apply to a bank then in the hands of receivers and perpetually enjoined from the transaction of all business. And yet it is impossible, under the authorities cited, to distinguish such a case from the case at bar.

Other provisions of the St. of 1862, *c.* 224, confirm this construction. When a savings bank fails to pay the taxes imposed by that act, the treasurer of the Commonwealth may bring an action for their recovery, and it may also be liable to an injunction restraining it from prosecuting its business until the taxes are paid. § 11. See also St. 1867, *c.* 52. It is clearly to be inferred from these provisions, that the corporations, upon which taxes are to be imposed by the statute, are those which are in the exercise of their corporate powers, and against which the proceedings and penalties provided may be enforced; and not those in the hands of receivers and perpetually enjoined from transacting business. *Columbian Book Co.* v. *De Golyer*, 115 Mass. 67, 69.

We are of opinion that the decree of the Chief Justice was correct in directing the receivers that the claim of the Commonwealth to recover a tax as of May 1, 1876, was invalid.

Decree affirmed.

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CROMPTON CARPET COMPANY *vs.* CITY OF WORCESTER.

Worcester. Oct. 6, 1876. — Jan. 5, 1878. COLT, MORTON & SOULE, JJ., absent.

The St. of 1856, *c.* 189, authorizing the city of Worcester, for the purpose of supplying the city with pure water, to take and convey into the city the waters of one of several streams or of a certain pond, at the election of the city council, and all water-rights connected therewith, and to take and hold land for such purpose, but not prescribing any mode by which the city should manifest its purpose to take any estate against the owner's right, nor providing for any notice, public or otherwise, to the owner of such purpose, and providing that the act should be "void unless submitted to, and approved by, the voters of the city," was not accepted by the city until December 12, 1871. The St. of 1861, *c.* 118, authorizing the city to take and convey into the city the waters of East or Lynde Brook, "in the manner and subject to the liabilities and restrictions set forth in" the St. of 1856, *c.* 189, was approved on March 30, 1861, and took effect on its passage. On February 8, 1864, the city council voted to take the waters of East or Lynde Brook, and proceeded to introduce them into the city. The St. of 1864, *c.* 104, also authorizing the city to take and convey into the city the waters of East or Lynde Brook, was passed on March 18, 1864, and took effect on its passage. The St. of 1871, *c.* 361, passed May 26, 1871, provided that the city "shall, within sixty days from the time its city council shall vote to take any lands or ponds or streams of water, by authority of this or any former act, file in the office of the registry of deeds," "a description of the lands, ponds or streams of water so taken, as certain as is required in a common conveyance of lands, and a statement of the purpose for which the same are taken, which description and statement shall be signed by the mayor of said city, and the property so taken shall vest in said city from the time of the filing of said description and statement;" that a landowner injured by such taking might apply by petition to the Superior Court within a certain time "from the taking of the said land, water or water-rights as aforesaid," for the assessment of his damages; and that "nothing in this act shall be construed to authorize said city to take" what it "is not now authorized by law to take." On December 22, 1871, the city council voted to take the waters of East or Lynde Brook, and directed the mayor to duly file the description and statement required, which the mayor did on December 27, 1871. A corporation which acquired title in 1870 to property, alleged to have been injured by the introduction of water in 1864, and for which no compensation had been made, duly filed its petition for damages under the St. of 1871, *c.* 361. *Held*, that the petition could be maintained.

PETITION to the Superior Court, filed May 23, 1874, under the St. of 1871, *c.* 361, § 3, for the appointment of commissioners to assess the damages sustained by the petitioner by the taking, by the city council of the city of Worcester, of East or Lynde Brook, in the town of Leicester, to supply the city with pure water.

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After the former decision, reported 119 Mass. 375, commissioners, appointed by the court, heard the parties, and made an award, filed February 24, 1876, in which they determined the amount which should be paid as damages to the petitioner. In the Superior Court, on March 27, 1876, the respondent claimed in writing a trial by jury, and the case was tried, before *Rockwell*, J., who allowed a bill of exceptions in substance as follows:

It appeared that the petitioner was the owner in fee simple of a tract of land in the southerly part of Worcester, lying on both sides of a natural stream of water called Kettle Brook, on which it had water-mills, a dam and a pond, for supplying power for the mills; that it acquired title to the land by deed on July 16, 1870; and that East or Lynde Brook was a natural stream of water flowing into Kettle Brook above the petitioner's premises.

It also appeared that the St. of 1854, *c.* 338, was accepted by the city of Worcester on May 27, 1854, and the St. of 1856, *c.* 189, on December 12, 1871. The St. of 1861, *c.* 118, was in evidence. The petitioner put in evidence the Sts. of 1864, *c.* 104, and of 1871, *c.* 361, and the following order of the city council, passed December 22, 1871:

"Whereas the city of Worcester, in the exercise of powers conferred by the laws of the Commonwealth, for the purpose of supplying said city with pure water, has heretofore erected a dam across the valley of East or Lynde Brook, in the town of Leicester, and thereby formed a reservoir of water, and has constructed an aqueduct for conveying the water of said Lynde Brook to said city, and has acquired and taken all the land occupied by said dam, and all the land flowed by the waters of said reservoir, and the right to flow said land by said waters, and all the waters of said East or Lynde Brook, and of all branches and tributaries thereof, and all waters flowing into said brook, branches and tributaries, it is now in the exercise of the powers aforesaid.

"Ordered, that all the aforesaid acts and doings of said city be, and the same are hereby established and confirmed, and that said city hereby takes and appropriates, for the said purposes, the right to raise said dam five feet above its present height, and the right, by means of said dam, to flow back the waters of said East or Lynde Brook upon the lands above said dam, and all the

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lands which would thereby be flowed; also a strip of land ten rods in width around the entire margin of the reservoir thereby erected for the preservation and purity of the same. Also a certain tract of land situated in said Leicester. [Here followed a description of the land covered by the reservoir.]

"And it is further voted, that all the lands, brooks, streams, water-courses, water-rights and rights of flowage hereinbefore mentioned, be and the same are hereby taken by said city, and forever appropriated, established and confirmed for the purpose of supplying said city with pure water, and for the laying out and maintaining an aqueduct for conducting said water to said city, and for forming a reservoir to contain and hold said water, and for the preservation and purity of said dam, reservoir, aqueduct and water, the same being necessary therefor.

"And his honor the mayor is hereby authorized and directed to file in the office of the registry of deeds for the county of Worcester a description of said lands, brooks, streams, water-courses, waters, water-rights and rights of flowage, as certain as is required in a common conveyance of lands, and a statement of the purposes for which the same are taken, said description and statement to be signed by the mayor, and to be under the seal of the city."

The petitioner also put in evidence a description of the water or stream taken by the respondent and a statement of the purposes for which it was taken, reciting the above order of the city council, dated December 26, 1871, signed by the mayor and filed in the registry of deeds on December 27, 1871.

The respondent put in evidence an order of the city council of Worcester made on February 8, 1864, and it was contended that this authorized the taking of land, and that the land of the petitioner was taken under it; but a statement of the language of this order is not now necessary.

It appeared that no compensation had ever been paid to the petitioner or to any former owners of its estate for any taking of East or Lynde Brook for supplying the city of Worcester with water. The judge ruled that the petitioner could not recover, and directed a verdict for the respondent; and the petitioner alleged exceptions.

T. L. Nelson, for the petitioner.

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W. S. B. Hopkins & F. T. Blackmer, for the respondent.

LORD, J. The statutes passed by the Legislature, and the proceedings of the city of Worcester under them, for the purpose of supplying that city with pure water, have hardly been direct, plain and unambiguous. An examination, both of the acts of the Legislature and the proceedings of the city, is necessary to determine the rights of the parties in this controversy.

The first legislation to which our attention is called is the St. of 1854, *c.* 338, entitled, "an act for supplying the city of Worcester with pure water." It will be observed, in reference to this act, that it gives to the city of Worcester no right to any property without the consent of the owner. It not only gives no such right, but in two sections of the act such authority is, in words, expressly denied. Section 8 requires that the legal voters of the city shall, within sixty days of its passage, vote upon the question of its acceptance by the city, "and if a majority of the votes so given upon the question shall be in the negative, this act shall be null and void." The act was duly accepted at the legal meeting of the voters within the sixty days.

The next statute in date, upon the subject, is the St. of 1856, *c.* 189, entitled, "an act in addition to an act to supply the city of Worcester with pure water." By this statute, the city of Worcester is authorized to take the waters of one or another of several streams, or from Quinsigamond Pond, at the election of the city council of the city, and was also authorized to "take and hold land around the margin of either of said ponds, or around any reservoirs or water-sources which they may possess or create, in the valleys of said brooks, for the purpose of supplying the said city with pure water."

Section 7 of this act provides that "all damages which may be sustained by reason of the taking by said city of any of the ponds or brooks aforementioned, or of the water thereof, or the water-rights connected therewith, or of diverting any portion of said water from its natural channel into other channels, or of erecting and maintaining any dam or reservoir, or digging up any land, street, road or highway, and entering upon the same for laying, repairing and maintaining pipes, conduits, hydrants and other apparatus necessary thereto, shall be paid by the said city of Worcester to the individual or corporation injured, which

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damages shall be assessed in the same manner as is provided in the twenty-fourth chapter of the Revised Statutes with regard to highways."

There are several peculiarities of this statute to which attention is necessarily called. In the first place, no mode is prescribed by which the city of Worcester shall manifest its purpose to take any estate against the right of the owner, nor the extent to which such right is exercised, nor is provision made for any notice to the owner, public or otherwise, of any purpose to take, nor of an actual taking of his property. It is further to be observed that no provision is made, unless it is to be inferred, for any damage for any land taken "around the margin of either of said ponds, or around any reservoirs or water-sources." This statute also was to be void, "unless submitted to, and approved by, the voters of the city of Worcester, at meetings held simultaneously for that purpose, in the several wards, upon notice duly given at least seven days before the time of holding said meetings."

It will be perceived that, unlike the former statute, which it was required should be accepted within sixty days, no limit for the acceptance of this act is fixed, and, in point of fact, it was not accepted until the year 1871, so that no rights would be acquired under it before that time. See *Locke* v. *Selectmen of Lexington*, 122 Mass. 290.

The next statute in the order of time is the St. of 1861, *c.* 118. The bill of exceptions finds that this statute was "in evidence," but by whom introduced, or for what purpose, the bill of exceptions does not show. Nor is that important. The question which we are to consider is, what is its effect? We cannot construe this, as contended by the respondent, as an act giving force and effect to the St. of 1856 without its acceptance by the voters of the city. We think its true meaning and effect is, that it is simply an amendment of the St. of 1856, *c.* 189, to take effect when and if such act should become effectual by acceptance.*

* This act, approved March 30, 1861, and entitled "An act in addition to an act for supplying the city of Worcester with water," is as follows:

"Section 1. In addition to the powers heretofore conferred, the city of Worcester is authorized to take and convey into and through said city the waters of East or Lynde Brook in Leicester, or of any other stream or pond

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The next statute in time is the St. of 1864, c. 104. This act was approved on March 18, 1864, and took effect upon its passage. Its provisions are substantially the provisions of the St. of 1856, c. 189, as amended by the St. of 1861, c. 118. There are in this act the same omissions which have been referred to as in the St. of 1856, and, if it should be material, we think those omissions might be held to be grave objections to the validity of the act.

It is found by the bill of exceptions that every act which was done by the city of Worcester, which by any possibility could be construed into a condemnation of private property to a public use, was done prior to the passage of the St. of 1864, the orders of the city council having been passed on February 8, 1864, more than a month before the passage of the act. In this condition the rights of the parties continued, until the St. of 1871, c. 361. The city of Worcester had proceeded to introduce a supply of water, but there is nothing to show that the city took or claimed any rights under the St. of 1864, and subsequently to its passage. In 1870 or 1871, the city desired to enlarge its reservoirs and to take more water than it had been accustomed to take. It was quite natural, then, that the city, before taking an additional quantity of water, should examine into the extent of the rights which it had acquired, or which it had authority under existing laws to acquire. Such examination would disclose the fact that the St. of 1856, c. 189, had not been accepted by the city, and that the acts which had been done by the city, which were in the nature of taking private property for

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in Leicester or Paxton, and to take and hold any land, and build and maintain any structures necessary for said purpose, in the manner, and subject to the liabilities and restrictions set forth in the one hundred and eighty-ninth chapter of the acts of eighteen hundred and fifty-six.

"Section 2. If at any time the supply of water from the source first fixed upon and selected shall be insufficient for the wants of said city, the said city may, by suitable works, conduct water from either of the other sources referred to in this act, or the act to which this is in addition, into the aqueduct first constructed, or into any reservoir therewith connected.

"Section 3. Said city is further authorized to take and hold by purchase any lands or rights, and interests therein, which may be necessary for the convenient accomplishment of the purposes of this act.

"Section 4. This act shall take effect on its passage."

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public use, were ordered to be done before the effectual passage of any law giving such right. The city might, therefore, well doubt whether it had acquired any right as against private owners. This court, in *Glover* v. *Boston*, 14 Gray, 282, had used this language: "The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by the use of ambiguous or uncertain language." This principle has been recently affirmed and approved in *Wilson* v. *Lynn*, 119 Mass. 174.

In this condition of things, the St. of 1871, *c.* 361, was passed. It is quite certain, from the peculiar phraseology of that act, that it was passed in consequence of the doubt which existed, whether the city of Worcester had acquired any legal title to a property upon which it had made very large expenditures. The deficiencies in the previous acts were remedied. Provision was made for making certain the rights of the owners of the property, as well as of the city, by requiring the city to make "a description of the lands, ponds or streams of water so taken, as certain as is required in a common conveyance of lands, and a statement of the purpose for which the same are taken, which description and statement shall be signed by the mayor of said city," &c. The act also provides a remedy for the person whose property is thus taken, which remedy is different from, and undoubtedly a substitute for, that provided in the Sts. of 1856 and of 1864. It is not important to consider whether this act is a mere enlargement of the statute of limitations, because we think it is clear that the whole scope and authority of the act was, to give to the respondent the election to stand upon its rights as they then existed, or to retake any land or other property, (which it contends previously to have taken,) under all the provisions, restrictions, limitations and burdens of this act.

The language of the various sections is quite peculiar in many respects. Section 2 commences, "The said city shall, within sixty days from the time its city council shall vote to take any lands or ponds or streams of water, by authority of this or any former act, file in the office of the registry of deeds for the county of Worcester a description of the lands, ponds or streams of water so taken, as certain as is required in a common conveyance of lands, and a statement of the purpose for which the same are

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taken, which description and statement shall be signed by the mayor of said city, and the property so taken shall vest in said city from the time of the filing of said description and statement."

Section 3 provides the mode of compensation, and that, if the city and the owner of the land cannot agree upon the amount of damages, the owner or person injured "may apply by petition for the assessment of his damages, at any time within three years from the taking of the said land, water or water-rights, as aforesaid, and not afterwards, to the Superior Court in the county of Worcester."

Section 7 is conclusive upon the question whether this act was passed for the mere purpose of enabling the city to do lawfully what it had theretofore failed to do in accordance with existing laws. That section is as follows: "Nothing in this act shall be construed to authorize said city to take any pond or stream of water, or any water-rights, which said city is not now authorized by law to take."

Under the provisions of this act, the city council passed the vote, and prepared a description and statement to be signed by the mayor, and filed in the registry of deeds, as appears in the bill of exceptions. Those acts vested another and different title in the city from what it had before. It had a certain fixed and vested estate in fee; whether in fee simple, or only a base fee, determinable thereafter, we need not inquire. The city has elected to take the rights which that act gives. Having done so, it must take it with the burdens. It does not appear whether any, or what, equities may exist between the petitioner and its grantor; but, as between the landowner and the respondent, it does appear that the respondent has not paid for the property which the petitioner alleges the respondent has taken. We do not decide the case upon any supposed equities; though it is satisfactory to know that the enforcement of the strict rules of law does not operate inequitably. *Exceptions sustained.*

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CHRISTOPHER C. RILEY *vs.* W. A. WILLIAMS & wife.

Worcester. Oct. 8, 1877. — Jan. 30, 1878. ENDICOTT & LORD, JJ., absent.

In an action on an account annexed for work and labor, the evidence tended to show a special contract, not in writing, by which the plaintiff agreed to do certain work for the defendant, and to receive in payment therefor a lot of land, to be selected by him out of a number of lots owned by the defendant, and blacksmith's work to a stated amount from a firm of blacksmiths; and that the plaintiff, after performing the labor, refused to accept payment as stipulated by the contract. *Held*, that, if the defendant was always ready and willing to convey to him the land at its fair market value, and the firm of blacksmiths was always ready to do the blacksmith's work for him at agreed or reasonable prices, the plaintiff could not rely on the fact that the special contract was not in writing, as required by the statute of frauds. *Held, also*, that the plaintiff could not prove, in this form of action, that, after allowing for the value of a lot and the stipulated amount to be paid in blacksmith's work, there would still be a balance due to him.

In an action on an account annexed for work and labor, the evidence in which disclosed a special contract, not in writing, the plaintiff requested the judge to put several specific questions to the jury, but the judge refused, and directed the jury to return a general verdict. *Held*, that the plaintiff had no ground of exception.

In an action against a husband and wife, the verdict of the jury in the title of the case omitted the words "and wife." *Held*, that it was within the discretion of the judge who presided at the trial to allow the jury, after they had separated, to amend their verdict by adding these words.

CONTRACT, against W. A. Williams and Susan E. Williams, his wife, on an account annexed for work and labor. Answer: 1. A general denial. 2. That the plaintiff did the work under a special contract, by the terms of which he was to take in payment blacksmithing work to a certain amount, and the balance in a building lot to be selected by the plaintiff near a certain street, the lot to be conveyed to the plaintiff by the defendants, in July, 1875.

At the trial in the Superior Court, before *Rockwell*, J., the plaintiff put in evidence a report of an auditor in his favor, and rested his case. The defendants put in evidence tending to show that in 1874 the female defendant owned a large tract of land in Worcester, a part of which she laid out in streets and lots according to a certain plan; that they employed the plaintiff to build one street, called St. Paul's Street, in May, 1874, by day's work, which he completed in June, 1874; that in July, 1874, they employed him to build sidewalks on said street by

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day's work at the same rates; that while the sidewalks were being built they employed him to build another street, called St. James Street, by day's work at the same rates, and that the plaintiff agreed to take blacksmithing of Cameron & Emerson to the amount of $400, and a low-priced lot, but that nothing was said as to the price or location of the lot except that it should be one of the lots on the plan; that the defendants afterwards introduced the plaintiff to Cameron & Emerson, and that he then told them he would take $400 in blacksmithing of them; and that Cameron & Emerson agreed with him to furnish the blacksmithing and take their pay in land of the defendants, if the work was furnished them by the plaintiff. It further appeared in evidence that the plaintiff did not take blacksmithing of Cameron & Emerson except to the amount of $5.28, which they charged to the plaintiff to keep it separate from a previous bill they had against the defendants, and which was paid for by him in money; and that the plaintiff had declined to take a lot of the defendants. Cameron and Emerson testified that they were unwilling to furnish any more blacksmithing to the plaintiff and take land of the defendants therefor at the then market value thereof. But they are now willing to take a lot at its present value and pay for it in blacksmithing according to the contract. There was also evidence tending to show that the $400 of blacksmith's work, and any of the lots on the plan taken at its fair market value in July, 1875, did not amount to as much as the plaintiff's claim for building St. James Street, and the evidence was conflicting as to whether the blacksmithing to be taken was $400, or $200, or a less amount. The plaintiff testified that he could not use $400 worth of blacksmithing in five years, and that the amount of $5.28 for blacksmithing was all he used in a month, which evidence was not contradicted.

Upon the above evidence, the plaintiff asked the judge to rule as follows: "1. That the contract with Cameron & Emerson was void for uncertainty, conditional and within the statute of frauds. 2. That the contract with the plaintiff concerning a lot was void for uncertainty and within the statute of frauds. 3. That the contract as set up in the answer was void for uncertainty and within the statute of frauds. 4. That if the jury believed the contract to be as testified to by the defendants, and

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that the blacksmithing and market value of said lot would not together amount to the sum found due by the auditor, they should find for the plaintiff for the difference."

The judge refused so to rule, and instructed the jury as follows: "If the jury are satisfied that the contract for working St. James Street was distinct and subsequent to the contract for working St. Paul's Street, that the plaintiff has been fully paid for St. Paul's Street, both for street and sidewalks, and that the contract for working St. James Street was that the plaintiff should do the work by the day at his usual prices, and to take his pay in part in a lot of Mrs. Williams's land and the rest in blacksmith work of Cameron & Emerson, they agreeing to furnish the blacksmith work, and the jury are satisfied that Mrs. Williams was always ready and willing to make a good and sufficient deed of the lot at its fair market value, and that Cameron & Emerson were always ready to do the blacksmithing for him when called for, at agreed prices, and the plaintiff has made no demand for the lot or the blacksmith work, he cannot recover in this action, though such special contract was not in writing. For services thus performed the plaintiff is not entitled to recover wages by the day, without proof that the defendants assented to pay the plaintiff by the day. If the contract was that the plaintiff should take a lot and $400 of blacksmith's work, the lot not being specified, except as one of the lots on the defendants' estate, opened by St. James Street, to be selected by the plaintiff, as the evidence shows those lots were of different values, if the plaintiff has never demanded a lot, but only denied his obligation to take any lot, he cannot prove in this action the value of a lot, so as to show that said value with the blacksmith work would make a sum less than his charges by the day, and so recover the balance in this action; but, if the special contract is proved, he cannot recover anything under this declaration."

The plaintiff asked the judge to instruct the jury to find the following special verdicts, namely:

"1. Is that part of the contract set up in the answer proved relative to payment to the plaintiff in a building lot?

"2. Is that part of the contract set up in the answer proved relative to payment to the plaintiff in blacksmithing of Cameron

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& Emerson? If yes, how much blacksmithing of Cameron & Emerson was the plaintiff to take in part payment for the plaintiff's work?

"3. If you find the answers to the above questions affirmatively, what sum is the plaintiff entitled to recover over and above such blacksmithing and building lot?

"4. What amount is due in money from the defendants to the plaintiff?"

The judge refused so to instruct the jury, and directed them to find a general verdict.

The jury returned the following verdict: "In the action C. C. Riley against W. A. Williams the jury find for the defendant." Six days after the jury had separated, the foreman was allowed by the judge, on motion of the defendants, to insert the words "and wife," in the verdict, after the name "W. A. Williams," which was objected to by the plaintiff.

The plaintiff alleged exceptions.

W. A. Gile, for the plaintiff.

F. T. Blackmer, for the defendants.

AMES, J. It has been settled by numerous decisions that an action will lie to recover back money paid, or for services rendered, by one party to an agreement which is invalid by the statute of frauds, and which the other party refuses to perform *Kidder* v. *Hunt*, 1 Pick. 328, 331. *Gillet* v. *Maynard*, 5 Johns 85. *Gray* v. *Hill*, Ry. & Mood. 420. *King* v. *Brown*, 2 Hill, 485. *Basford* v. *Pearson*, 9 Allen, 387. *Williams* v. *Bemis*, 108 Mass. 91. *Parker* v. *Tainter*, *ante*, 185.

But the plaintiff does not bring his case within this rule Under the instructions given, the jury must have found that, although the services as claimed by the plaintiff were actually rendered, yet he had agreed that he should be paid in the manner stipulated in an executory contract which the defendants are ready and able to perform. If he was to be paid partly in a lot of land belonging to the female defendant, and partly in blacksmith's work to be furnished by Cameron & Emerson, and the jury were satisfied that the defendants were ready and willing, at all times, to convey the land, at its fair market value, and Cameron & Emerson were always ready to furnish the blacksmith's work for him when called for at agreed or reasonable

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prices, it is not for the plaintiff to object that this special contract was not binding because it was not in writing. It was wholly immaterial that no action could be maintained on this special contract, because it was not reduced to writing, if the defendants were willing and ready at all times to carry it into full effect. The plaintiff cannot force the defendants to take their stand upon the statute. *Coughlin* v. *Knowles*, 7 Met. 57. *Wetherbee* v. *Potter*, 99 Mass. 354, 361.

It is true that it does not appear from the bill of exceptions that there was any specific designation of the lot of land which he was to take. It was to be one of the lots on the plan, and was to be a low priced one, and by "low priced" we understand it was to be at a low rate of price in proportion to its area. He would under such a contract have a right to select any lot answering that description. If he refused to select and demand any lot, and denied that he was bound to take any, he cannot prove in this action that, after allowing for the value of a lot and the stipulated amount to be paid in blacksmith's work, there would still be a balance due to him. The special contract, if proved as alleged, was executory, and, as there is no refusal by the defendants to fulfil it, he cannot recover anything under this declaration.

The questions which the plaintiff desired to have answered by the jury are sufficiently disposed of by the general verdict, and we cannot see that the plaintiff suffered any detriment by the refusal of the judge to require them to be specifically answered.

The ruling of the court, allowing the amendment in the name and description of the cause in the verdict, by adding the words "and wife" after the name of the male defendant, was in conformity to the truth, and wholly a matter of sound judicial discretion. As such, it was not a matter of exception.

Exceptions overruled.

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SILVIUS H. LITTLE *vs.* INHABITANTS OF BROCKTON.

Plymouth. Oct. 16, 1877. — Jan. 14, 1878. MORTON, LORD & SOULE, JJ., absent.

In an action against a town for injuries occasioned by an alleged defect in a highway, there was evidence that the highway was twenty-six or twenty-seven feet wide between its edge on the east side and a ditch ten and a half feet wide and two and a half feet deep on the west side; that it was even, smooth and hard, and worked for travel the whole width, although the travelled part was on the west side and was from sixteen to seventeen feet in width; that there were two culverts under the road, fifty-six feet apart, the southerly one being filled up and disused; that near the northerly culvert a grassy bank sloped down gradually to the ditch, and became somewhat more abrupt a little further south, but still preserved its slope until, at the place of the accident, a point a few feet north of the southerly culvert, it suddenly retreated and became perpendicular; that there was no railing along the bank and no posts except at the northerly culvert; that the plaintiff was driving on the highway in a southerly direction with a heavily loaded wagon and two horses; that one of the horses was walking and both were under his guidance and control; that he met a wagon a few rods from the place of the accident, and turned out to the right for it, and went near the edge of the travelled road, but not outside of it; that he then saw a large wagon coming towards him in the centre of the road, and behind it a one-horse buggy, and so kept on in the same course, and did not turn back into the road again; that the wagon turned out so that there were about four feet between it and the plaintiff's wagon; that the plaintiff's wife, who was sitting at his left, said, "We 'll be off the bank;" that the plaintiff looked and saw that it was not dangerous in his opinion, and looked back at the wagon that had passed; that the plaintiff's attention was then attracted to the road, and he then saw the perpendicular place in the bank within three or four feet of his forward wheel; that he then found that he could not turn into the road without running into the buggy; that he could not stop or turn to the right because the wheels of his wagon were on the edge of the bank, and he would have upset sideways; that he thought the only chance to escape was to turn square off and go down the bank; that he did so, his wagon was overturned, and he injured. *Held*, that there was no evidence which would warrant the jury in finding that the plaintiff was in the exercise of ordinary care and prudence.

TORT for personal injuries alleged to have been caused by a defect in a highway called Main Street, in the defendant town, and about a mile from the centre of the village, on May 29, 1874. Writ dated April 28, 1875.

At the trial in this court, before *Endicott*, J., there was evidence tending to show that the road in question was twenty-six or twenty-seven feet wide between its edge on the east side and a ditch on its west side, and about the same width for some distance to the north and south; that it was even, smooth and

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hard, and worked for travel the whole width; that there was a narrow footpath about a foot wide on each side; that the easterly side of the road was more or less grassy; that the travel was on the westerly side of the road, and that this travelled part was from sixteen to seventeen feet in width only, although the entire road was safe for travel; that westerly of the roadway, and between it and the wall, was a ditch, ten and a half feet wide and two and a half feet deep, containing some six inches of mud and water; that there were two culverts under the road, the southerly one of which was filled up and disused, and that the accident happened a few feet north of this southerly culvert; that near the northerly culvert a grassy bank sloped down gradually to the ditch, and became somewhat more abrupt a little further south, but still preserved its slope until, at the place of the accident, it suddenly retreated, and became perpendicular; that there was no railing along the bank at any point, and no posts, except two ancient posts that stood immediately against the northerly culvert.

There was also evidence tending to show that the plaintiff was a pedler, and had been accustomed to drive horses for many years, and that he was driving on the highway in a southerly direction, between four and five o'clock in the afternoon, with two horses attached to a loaded pedler's wagon, which weighed, together with the plaintiff and his wife, who was with him, about three thousand pounds; that about a mile from the place of the accident the plaintiff's nigh horse became frightened and ran about three quarters of a mile; that the plaintiff stopped the wagon, and kept it stationary for a minute, and then started at a gait not exceeding three miles an hour; that the nigh horse was hopping up and down in a sort of short canter, and the plaintiff drove him so as to make him draw the load; that the off horse was walking, and that the horses continued to proceed in this manner, under the guidance and control of the plaintiff, until the accident occurred; that, after stopping as before stated and starting again, the plaintiff met two wagons at different points, and turned out to the right for each, and turned back again into the road; that he then met a market wagon a few rods from the place of the accident, and turned out to the right for that, and went near the edge of the travelled road, but not

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outside of it; that he then saw a large two-horse logging wagon coming towards him in the centre of the road, and behind it a one-horse buggy, with two ladies, and so he kept on in the same course, and did not turn back into the road again; that the logging wagon turned out so that there were about four feet between it and the plaintiff's wagon; that as the logging wagon passed, its driver threw up his hands; that the plaintiff's wife, who was sitting at his left, said, "We 'll be off the bank;" that the plaintiff looked and saw that it was not dangerous in his opinion, and said, "No, I guess not," and looked back to see what the man in the logging wagon was doing, but he had passed beyond the line of the front of the plaintiff's wagon, so that the plaintiff could not see him, although he could see the back part of the logging wagon; that the plaintiff's off horse then pressed into the road, and attracted the plaintiff's attention, but did not turn the wagon, which the nigh horse was drawing; that the plaintiff then looked and saw that there was a place in the bank right ahead of him, within three or four feet of his forward wheel, which was perpendicular; that he immediately looked to see if there was a chance to turn into the road and pass along; that he then saw the buggy with the ladies in it coming up on the side of the road where the plaintiff was, about twelve or fourteen feet, or two thirds the length of the plaintiff's team, behind the logging wagon, with its off wheels about in line with the centre of the plaintiff's wagon; that the buggy had turned to the right, so as to be at an angle with the road, and had nearly stopped, the horse walking and being abreast of the plaintiff's horses, and the buggy was in such a position that, if the plaintiff had turned his horses to the left, he would have brought his nigh horse's head over the off forward wheel, and driven the pole of his wagon into the body of the buggy; and that, if he had stopped, the weight of his wagon would have sent its off wheels down the perpendicular bank, on the edge of which he now was, and caused the wagon to go over sideways.

The plaintiff testified as follows: "There my team stood. I could not go ahead, because there was no room. I could not stop, because my team was on the bank; my wheels were on the edge of the bank. I could not turn into the road, because there was a team there right in the way. I saw the only chance to

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escape from it for myself and my wife was to turn square off. I drew the reins to turn square off, and my horses went down that bank, and hardly stumbled, and did not go off their feet at all, went to the wall some ten feet and a half, and there was not room enough; so when they got to the wall, my load was pressing on to them, and I had to turn them down straight. When I turned their faces down the street, the bank was so abrupt, so deep, the wagon went over with a crash. I saw the wagon was going over, and I sung out 'Whoa,' and drew in the reins, and my team stopped as suddenly as a team could stop, and they stood there." The plaintiff also testified that he received severe injuries from the accident.

On the above evidence the judge directed the jury to return a verdict for the defendant; and reported the case to the full court for the determination of the questions of law arising thereon. If the ruling was wrong, the case was to stand for trial; otherwise, judgment to be entered for the defendant.

Annexed to the report, and made a part of it, was a plan of the locality of the accident, from which it appeared that the two culverts were fifty-six feet apart, that the slope of the bank, forty feet from the southerly culvert, was one foot and eleven inches from the top to the ditch, and that the perpendicular descent at the southerly culvert was two feet and eight inches.

P. E. Tucker, for the plaintiff.

G. O. Shattuck & C. W. Sumner, for the defendant.

COLT, J. The plaintiff drove his horses and loaded wagon out of the travelled path of the highway into a ditch two and a half feet deep, containing some six inches of mud and water. The highway upon which he and his wife were travelling was without railing, but was constructed twenty-six or twenty-seven feet wide for the use of carriage travel, and was for this entire distance even, smooth and hard. The plaintiff having, as he testifies, the guidance and control of his horses, and having been warned by his wife that he was in danger of going off the bank, drove in the daylight so near the edge of this road, that in order to prevent going over sideways, as he says, he turned his horses square off the bank, and received the injury complained of.

For this voluntary act of the plaintiff, the evidence discloses no sufficient excuse. There is nothing in the circumstances of

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the case which would justify a jury in finding that it was an act of ordinary care and prudence, which, without his fault, had become necessary to protect himself or his horses and wagon from greater danger. There is no reason shown for driving with horses, of which the plaintiff had control, so near the edge of the road. He claims that, being in that position, he found himself so near the bank that he could not stop without going off, and that two alternatives were presented to him, either to run into an approaching wagon, or to turn off as he did. But his position so near the bank was through his own want of due care, for which no excuse is shown, and being there he must choose either alternative at his own risk. A party cannot relieve himself from a dangerous position into which his own fault has brought him and hold the town responsible for the result. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137. *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass. 208.

It is not necessary to consider whether the want of a railing constituted a defect, or whether this accident would have been prevented if a suitable railing had been erected at this point.

Judgment for the defendant.

NEHEMIAH RIPLEY *vs.* EDWARD G. KNIGHT.

Plymouth. Oct. 16, 1877. — Jan. 14, 1878. MORTON, LORD & SOULE, JJ., absent.

After a dispute of some years' duration between a town and the proprietors of common lands therein, about the rights of taking seaweed from the shores, the Legislature, upon the petition of the proprietors and with the consent of the town, incorporated the proprietors by an act which defined the bounds of their lands and reserved to the town "the privilege of the shores." For several years before and for twenty-six years after the passage of this act, the town let to various persons the right to take seaweed, sand, gravel and stones from the shores or beaches, and used such sand and gravel to repair its highways, and during that period it was not interfered with by the proprietors. *Held*, that the town's "privilege of the shores" included the right to take sand and gravel to repair its highways, if the beach would not be materially affected thereby.

TORT for taking sand and gravel from the southerly portion of Nantasket or Long Beach in Hull. The case was submitted

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to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, so much of which as is necessary to the understanding of the point decided was as follows:

The defendant, acting under the authority of the town of Hull, dug up and carried away the sand and gravel for the purpose of repairing its highways; and, if the town had the right to take sand and gravel from the beach, the defendant was justified in so doing; all such sand and gravel was taken from between mean high-water mark and mean low-water mark. The beach in question was within the bounds of the common and undivided lands in Hull, recited in the St. of 1811, *c.* 56, §§ 1, 8, and was conveyed to the plaintiff by the county commissioners of the county of Plymouth on November 14, 1866. For some years before 1810 the rights of taking seaweed from the beaches, and of feeding cattle on the common and undivided lands in Hull, had been in dispute between the proprietors and the town. In May, 1810, the proprietors presented a petition to the Legislature, representing that, in consequence of the town's never having particularly located a highway across these commons, the inhabitants had claimed and exercised a right of turning their cattle and sheep into the streets, whereby they had free communications with the commons; and praying for an act of incorporation "to enable the proprietors of these common rights to secure, manage and dispose of the same, so as to secure their rights and best promote their interests."

On November 17, 1810, the town passed this vote: "Voted, not to oppose the petition of said proprietors, if the proprietors agree to let the town have the beaches; also all the feeding lands in the township from Stony Beach to the point that is enclosed by gates and water-fences; also said town doth agree to give up to said proprietors all the feed that grows on the road leading through said commons. In consequence, said proprietors are to give up said beaches to the town, that is to say, said proprietors do give up to the town all said beaches rent for, be it more or less; then voted and agreed that the town pay for all the gates and water-fences."

On June 22, 1811, the Legislature passed an act incorporating the proprietors, (St. 1811, *c.* 56,) the first section of which defined

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the boundaries of their lands, including the whole of Nantasket or Long Beach, and the third section contained this clause, "also reserving to the town of Hull the privilege of the shores, and of feeding all lands, not comprehended within the aforementioned bounds."

The records of the town from 1780 to 1808 are lost, and no propriators' records between those dates are in existence, so that no means exist of ascertaining who had control of and took the seaweed, sand and gravel from the beaches during that time. In 1808, 1809 and 1810, the town voted to let to various persons the right to take from the beaches seaweed, stones, sand and gravel. From 1810 to 1837, the town, by various votes, sold stones, sand, gravel, seaweed and driftwood from the beaches, claimed the beaches as belonging to the town, and that they were to be defended as such by law, and used sand and gravel from the beaches to repair its highways; and during that period the town was not interfered with in its dealing with the beaches, its doings being known to the proprietors. The proprietors organized under the St. of 1811, on March 5, 1812, and have since had exclusive possession of the land described in the first section, except in so far as their possession of Nantasket or Long Beach is deemed to be controlled by the facts herein stated. For a long series of years, beginning as early as 1837, until 1864, as shown by the votes of the town and of the proprietors, the right to manage the beaches was in controversy between them. On May 29, 1865, the county commissioners of the county of Plymouth purchased, under the authority of the St. of 1864, *c.* 45, the common and undivided lands of the proprietors.

H. D. Hyde & J. O. Burdett, for the plaintiff.

P. E. Tucker, for the defendant.

ENDICOTT, J. This record presents the question whether the town of Hull has the right to take sand and gravel from the beach of the plaintiff to repair its highways. In deciding this, it is unnecessary to consider whether the ancient title to this beach and the other beaches in Hull was in the proprietors of the common and undivided lands in Hull, from whom the plaintiff has derived his title. There was a controversy between the proprietors and the town in regard to the right to take seaweed, sand, gravel and stone from the beaches and shores, and in 1810

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the proprietors applied to the Legislature for an act of incorporation. Of this the town had notice, and in town meeting it was voted, among other things, not to oppose the petition, "if the proprietors agree to let the town have the beaches." By consent of both parties, the St. of 1811, *c.* 56, incorporating the proprietors, was passed; and § 3 contains the clause, "also reserving to the town of Hull the privilege of the shores, and of feeding all lands, not comprehended within the aforementioned bounds;" the bounds are described in § 1. It is obvious that it was not the intention by these words to confer any new privilege or rights upon the town, but that the town should retain such privilege or right as it then possessed and had previously exercised.

In *Cushing* v. *Worrick*, 9 Gray, 382, it was held that this clause confirmed the privilege of the town to all the beaches, and not merely to those "not comprehended within the aforementioned bounds," and that the act, having been passed by consent of all the parties in interest, was binding. The court say: "The construction which we adopt is the same which was acquiesced in by the parties for twenty-six years succeeding the passage of the statute." It was accordingly decided that a lessee of the proprietors could not maintain an action against a person who, acting under a license from the town, had taken seaweed from Nantasket Beach.

The only question in this case is whether the "privilege of the shores" includes the right to take sand and gravel, as well as seaweed. The extent of the "privilege of the shores," reserved to the town, is not defined or limited by the statute. If we were to construe these words by themselves, as creating a new right in the town, and without regard to the peculiar circumstances under which the act was passed, the question would be presented for decision whether they would authorize the town to remove sand, earth or gravel, cast upon the shore by the sea and becoming part thereof, although capable of being removed without damage to the shore itself. But construing the words "reserving to the town the privilege of the shores," in view of the actual condition of things at the time, and of the subject matter to which they apply, as a simple confirmation of the privilege then existing and enjoyed by the town in the shores, we may properly look to the acts and the conduct of the parties to ascertain the

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extent of the privilege thus intended to be reserved and confirmed to the town. On this point, the record affords abundant evidence.

The records of the town and of the proprietors from 1780 to 1808 are lost. But it appears by the town records that in 1808 the town voted to let to various persons the right to take from the shores and beaches seaweed, sand, gravel and stone. Similar votes were passed in 1809 and in 1810. During that time, it does not appear that the proprietors exercised any authority over the beaches. And it is agreed that the town dealt with the beaches, each year from 1808 to 1837, in the manner indicated by their votes, and during that period it was not interfered with by the proprietors. We find therefore disclosed by these records and agreements the character and extent of the use or privilege in the shores, exercised by the town at the time the act was passed, and the acquiescence of the proprietors in such use for twenty-six years afterwards. And we are of opinion that this use was intended to be reserved to the town as "the privilege of the shores."

Nor is the natural meaning of the word "privilege," which may be defined as a right peculiar to an individual or body, inconsistent with this construction. As applied to the shores of the sea, its obvious meaning is the right to take those things cast upon the shore by the sea. They are alluded to in *Cushing* v. *Worrick*, as seaweed, shells, and other profits of the beach or shore between high and low-water mark. But what these profits are must depend upon the circumstances of each case. Sand, gravel and stones are often washed by storms upon a sea beach, the removal of which would not materially affect the beach itself. In some localities, great quantities of such material are thrown up. We cannot say that this is not the case upon the beaches and shores of Hull, and, from the record, such appears to be the fact. The right to remove them might, under such circumstances, be properly described as a privilege, if it appears that such was the right intended to be given or secured. There is nothing in this case which shows that the defendant, acting for the town of Hull, exceeded this privilege when he took sand, earth and gravel, for the repair of the highways, from the plaintiff's beach. And it is unnecessary to determine whether the

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privilege named in the statute gives any more extensive right to the town than this.

After 1837, and until 1864, when, by the St. of 1864, *c.* 45, the county commissioners were authorized to purchase of the proprietors their lands, the right to manage the beaches was in controversy between the town and the proprietors. But that fact is immaterial, as the rights of the town, to the extent we have indicated, were determined by the St. of 1811. The plaintiff, who purchased of the county commissioners, can have no greater rights than the proprietors, and takes his land subject to such privileges as the town may have therein.

No argument was addressed to us by either side in regard to the St. of 1864, *c.* 45, § 3, and we have not considered the bearing of that section on the matter in controversy.

*Judgment for the defendant.**

BENJAMIN F. POPPLE *vs.* DANIEL E. DAY & others.

Bristol. Oct. 23, 1877. — Jan. 14, 1878. LORD & SOULE, JJ., absent.

It is a good consideration for a promissory note that the promisor gave it at the request and for the benefit of his son, who was in the employ of the promisee, to be applied by the latter towards the payment of a defalcation of the son, the note being so credited to the son on the books of the promisee.

A. executed a deed of mortgage of land containing the condition "that if, on demand, there shall be paid" $1000 on a certain promissory note, signed by A. as indorser, then the deed should be void. The note was signed by A.'s son as principal, and was for more than $1000, and was given on account of a defalcation of his, and upon the giving of which the son was taken back into the promisee's employ, upon an agreement that a part of his wages should be applied in payment of the debt, under which arrangement more than $1000 was received by the promisee out of the son's wages, leaving more than $1000 due on the note. *Held*, on a bill in equity by A. to redeem the mortgage, that the amount received from the son's wages was not to be credited to the mortgagee.

A decree of a judge in equity, making an allowance of interest in accordance with a finding of a master, to which no exception was taken, cannot be revised on an appeal to the full court.

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* The St. of 1878, *c.* 163, makes it an offence, punishable by fine or imprisonment, for any person or corporation to take or remove, without the consent in writing of the board of harbor commissioners, from any of the shores or beaches in the town of Hull, "any earth, sand, gravel, stones or other material of like nature, now or hereafter composing such shores or beaches."

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COLT, J. This was a bill to redeem two mortgages given by the plaintiff to the defendants, one to secure the payment of the plaintiff's promissory note for $700, and the other to secure the payment of $1000 on a note for $3860.38, held by the defendants, and signed by the plaintiff's son as principal and by the plaintiff and one Sisson as indorsers. The case was sent to a master, and comes up on appeal from the decree of a single judge, disallowing the plaintiff's exceptions to the master's report, and giving the plaintiff the right to redeem both mortgages on payment of the amounts due thereon, with interest and costs.

The plaintiff relies on two exceptions to the master's report. As to the first, the evidence fully justified the master in finding a legal consideration for the $700 note. The note itself, produced by the defendants, imports a good consideration and makes out a *primâ facie* case, which must prevail, unless overcome by the evidence relied on by the plaintiff. But that evidence, so far from defeating the presumption arising from the note, tends plainly to support it. It is fairly to be inferred from the facts stated, and the circumstances under which the note was given, that the plaintiff gave the note at the request and for the benefit of his son, and upon the understanding that it should be applied by the defendants to the payment of the amount due them on account of a defalcation of the son, who was in the defendants' employ. The master properly so found, and this, with the fact that the note was so credited to the son on the defendants' books, makes a good consideration for it. *Forster* v. *Fuller*, 6 Mass. 58. *Delano* v. *Bartlett*, 6 Cush. 364.

The second exception depends on the construction to be given to the condition in the mortgage given to secure the payment of $1000. It appeared that on account of further defalcations on the part of the son, a note for over $3800 was given by him to the defendants, which was indorsed, and, by a separate writing, guaranteed by the plaintiff and Sisson; and that thereupon the son was taken back into the defendants' employ, upon an agreement that a part of his wages should be applied to the payment of the debt. Under this arrangement, more than the amount of $1000 was reserved by the defendants out of the son's wages.

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The plaintiff contends that the application of the son's earnings will more than satisfy the condition of the mortgage, and that the master ought so to have applied them. The condition in question is, in substance, "that if on demand there shall be paid" the sum of $1000 upon the note for $3860.38, then the deed shall be void; no note or other security for the $1000 having been given by the mortgagor. If the construction contended for is the true construction, then the payment of the amount named on the note for the larger sum, from any source, even if it were a payment by Sisson, the co-surety, would discharge the plaintiff's mortgage. But payment of a sum of money to be made on demand, as a condition upon which a mortgage upon real estate shall be discharged, as commonly understood, means payment by the mortgagor upon a demand made upon him, rather than payment by a stranger to the deed with or without a demand. The reasonable construction of the condition is, that it was intended and understood to limit the amount for which the land conveyed should be held as security for the payment in part of the larger sum named in the note, and to provide that the payment of that limited amount on the note by the mortgagor, on demand, should release the land; and we see nothing in the circumstances of this transaction to control this construction.

As to the allowance of interest in the decree appealed from, it is sufficient to say that the time from which interest is to be computed was found by the master and reported by him, with no exception taken by the plaintiff. The decree follows the finding of the master, and no error is apparent in this respect.

Decree affirmed, with costs.

T. M. Stetson & F. B. Greene, for the plaintiff.

C. W. Clifford & W. Clifford, for the defendants, were not called upon.

Elijah Wilbur *vs.* City of Taunton.

Bristol. Oct. 24, 1877. — Jan. 19, 1878. Lord & Soule, JJ., absent.

A petition under the Gen. Sts. c. 44, § 19, to the mayor and aldermen of a city, alleging the ownership of land on A. Street and damages thereto because of repairs on A. Street, B. Street and C. Street, with a prayer for compensation, is sufficient, and will entitle the petitioners to damages sustained by reason of the repairs on A. Street

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PETITION for a jury to assess the damages to the petitioner's estate situated on both sides of Arlington Street, by raising, lowering and changing the grade of Arlington Street, Purchase Street and School Street, in the city of Taunton.

At the trial in the Superior Court, before *Rockwell*, J., the plaintiff contended that Arlington Street and Purchase Street were parts of a continuous line of public street, so constructed, with one continuous road bed and gutters, along Arlington Street through School Street into Purchase Street, that water was constantly thrown on the plaintiff's land. The judge ruled that no evidence of any repairs outside of the limits of Arlington Street was competent. The petitioner offered in evidence the following petition for damages, dated April 8, 1876, signed by him, and presented to the mayor and aldermen:

"To the Mayor and Aldermen of the City of Taunton. The undersigned, Elijah Wilbur of Taunton aforesaid, represents that he is an owner of land adjoining Arlington Street, in said Taunton, and on both sides of said street; that the city of Taunton by its agents has done certain acts for the purpose of repairing said Arlington Street and Purchase Street and School Street, which are public highways in said Taunton, and has raised, lowered and changed the grade and pitch of said Arlington Street and Purchase Street and School Street, whereby this petitioner has sustained damage in and to his said property. Wherefore the petitioner prays that compensation may be allowed him in the premises, and that his said damages and the compensation therefor be forthwith determined by you."

The respondent asked the judge to rule that the action could not be maintained, because the petition to the mayor and aldermen was not in accordance with the provisions of the Gen. Sts. *c.* 44, § 19, in that the petition prayed for compensation on account of repairs to other streets than Arlington Street. The judge so ruled, and directed a verdict for the respondent, and, by consent of parties, reported the case for the determination of this court.

C. A. Reed, for the petitioner.

S. M. Thomas, for the respondent.

COLT, J. The Gen. Sts. *c.* 44, § 19, provide that "when an owner of land adjoining a highway or town way sustains dam-

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age in his property by reason of any raising, lowering or other act, done for the purpose of repairing such way, he shall have compensation therefor." This right is confined to the owner of land adjoining the street which is repaired. There is no right to compensation beyond what the statute gives, and no damages can be had for injury occasioned by repairs on other streets. *Jamaica Pond Aqueduct* v. *Brookline*, 121 Mass. 5. *Castle* v. *Berkshire*, 11 Gray, 26.

In his petition to the mayor and aldermen of the city, as well as in his petition to the Superior Court, the petitioner alleges in substance that he owns land on both sides of Arlington Street, which is injured by repairs done on Arlington Street and Purchase Street and School Street. The form of the allegation implies that these three streets are separate and different streets. If they are so, then plainly damages can be recovered only for the repairs on Arlington Street. It is not necessary now to decide how it would be if, upon proper allegations in the petition, it should appear that these three streets constituted only one single street, used for a continuous line of travel, though called by different names in different portions of its length. In former times such streets were common and possibly may still be found. *Arnold* v. *Cambridge*, 106 Mass. 352.

The verdict in this case must be set aside on another ground; the ruling that the petition to the mayor and aldermen did not conform to the provisions of the statute, followed by directing a verdict for the defendant, was erroneous. The petition in question contained all the allegations necessary to give jurisdiction to and call for the action of the mayor and aldermen. It alleges the petitioner's ownership of land adjoining one of the streets named, and damage occasioned by the repairs of that street, with a prayer for compensation. If he is confined by law to that one street, then this is a petition for damages for repairs in that street only. The prayer for damages for repairs on other streets, upon which he was not alleged to be an owner, was mere surplusage, which could not defeat his valid claim, and which could not have prejudiced the rights of the defendant on the trial of the question.

In proceedings of this description, strict rules of pleading are not to be applied. It is enough if the requirements of the stat-

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utes are substantially complied with in the allegations which set forth the petitioner's claim. *Verdict set aside.*

COMMONWEALTH *vs.* NATHAN M. HAWKES.

Essex. Nov. 7, 1877. — Jan. 1, 1878. MORTON & SOULE, JJ., absent.

A special justice of a police court is a "judge of any court of this Commonwealth (except the Court of Sessions)" within the eighth article of amendment of the Constitution, and therefore cannot at the same time have a seat in the House of Representatives.

Such a judge, as the eighth article of amendment of the Constitution of the Commonwealth declares shall not have a seat in the House of Representatives, legally vacates his judicial office by accepting a seat in the House, and, if he continues to exercise the functions of a judge, may be ousted by an information in the nature of a quo warranto.

INFORMATION, filed July 9, 1877, by the attorney general in behalf of the Commonwealth, alleging that in the city of Lynn, in the county of Essex, there was and long had been established a police court; that said police court consisted of one standing justice and of two special justices; that on January 15, 1867, Nathan M. Hawkes of said Lynn was duly appointed and commissioned a special justice of said police court, and since said January 15 had acted as such special justice; that he was duly elected a member of the House of Representatives of the Commonwealth for the year 1877, and on Wednesday, January 3, 1877, took his seat as a member of the House of Representatives, in accordance with his election, and had ever since and still held his seat in the House of Representatives; that by reason thereof he ceased to be a special justice of said police court, yet he had ever since that day continued to act and still acted as special justice of said court; and concluding as follows: "Wherefore said attorney general giveth the court to understand and be informed that said Hawkes, without any legal warrant or right whatever, is in the use and exercise of said office of justice of the police court in the city of Lynn, and has usurped the same, in contempt of said Commonwealth, and against the peace and dignity of the same. Whereupon said attorney general for said Commonwealth prayeth the consideration of the honorable

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court here in the premises, and that due process of law may be awarded against him, said Nathan M. Hawkes, in this behalf, to make him answer to the Commonwealth, and show by what authority he claims to have, use and enjoy the office aforesaid."

It was thereupon ordered that notice be given to the defendant to appear on a day named and show cause why the prayer of the information should not be granted.

The defendant appeared and filed a demurrer to the information; and the case was reserved by *Lord*, J., for the consideration of the full court on the information and demurrer.

R. E. Harmon, for the defendant. 1. A justice of a police court is not a judge of any court, within the meaning of the eighth article of amendment of the Constitution. In 1821, the time of the adoption of the amendment, there were no police courts in the Commonwealth. The act then applied only to the Supreme, Common Pleas and Probate Courts. The Court of Sessions, excepted in the amendment, had jurisdiction of matters formerly within the jurisdiction of the Court of Common Pleas. The amendment applies only to superior courts of judicature, of which the Probate Court is one. The jurisdiction of police courts is substantially that then exercised by justices of the peace; and is not within the amendment.

2. A special justice is not a judge of the court. He may act under certain circumstances, as a coroner may serve a writ, but the one is not a sheriff nor the other a judge. In certain contingencies he can act in place of the justice, but he is not a justice, even in name.

3. The offices are not incompatible at common law. Judges of the highest courts have always sat in at least one House of Parliament. They are not made so in terms by the eighth article of amendment of the Constitution, but a seat in either House of the Legislature is denied specifically. The eighth article of amendment made very considerable changes in the law as to incompatibility and plurality of offices, so that the law before that time affords no guide to the meaning of the amendment. The article contains two provisions: The first relates to state offices, and provides that certain officers, including United States officials, over whose tenure of office it can exercise no control, shall not hold certain state offices, over which it has full con-

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trol. The second relates to state officers accepting certain United States offices, and provides that they shall not continue to hold the state offices, but the acceptance of the national offices shall be deemed a resignation of the state office. The first provision alone concerns this case. Can the words "shall not hold," in case of a United States official, receive their literal sense, and in case of a judge receive a constructive meaning precisely opposite to the literal one? Shall the plain penalty of the law be always evaded by creating a constructive vacancy? The second clause of the amendment forcibly suggests that the first clause was to receive its literal sense, since it vacates the first office only when it has no control over the second. Again, the eligibility of a member to his seat is more easily, naturally and readily determined than the right to the other offices. The construction that the seat is invalid has been held many times under this amendment and the constitutional provisions in force before it. Mass. Election Cases, (ed. 1853) 28–30, 251.

W. C. Loring, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

GRAY, C. J. The decision of this case depends upon the construction and effect of that provision of the eighth article of amendment of the Constitution of the Commonwealth, adopted by the people in 1821, which declares that "no judge of any court of this Commonwealth (except the Court of Sessions)" "shall at the same time hold the office of Governor, Lieutenant Governor, or councillor, or have a seat in the Senate or House of Representatives of this Commonwealth."

The Court of Sessions never had any jurisdiction of civil actions; the criminal jurisdiction which it formerly had was transferred in 1804 to Courts of Common Pleas; and its functions, at the time of the adoption of the constitutional amendment, were principally administrative, as the agent and representative of the county in all matters touching its finances and general prudential concerns, such as the allowance and settlement of county accounts, the estimate and apportionment of county taxes, the erection and repair of county buildings, the granting of licenses, the laying out, altering and discontinuing of highways, the establishment and regulation of ferries, and generally exercising such powers as have since been vested in county com-

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missioners. Sts. 1803, *c.* 154; 1807, *c.* 57; 1818, *c.* 120; 1819, *c.* 139; 1827, *c.* 77. Rev. Sts. *cc.* 14, 26. Gen. Sts. *cc.* 17, 47. *Hampshire* v. *Franklin*, 16 Mass. 76, 88. *Commonwealth* v. *Holmes*, 17 Mass. 336. *Fay, petitioner*, 15 Pick. 243. *Dearborn* v. *Ames*, 8 Gray, 1, 14.

At that time, the strictly judicial power was distributed among other courts and magistrates. Justices of the peace had criminal jurisdiction of simple assaults and batteries, and civil jurisdiction of actions in which the debt or damages demanded did not exceed twenty dollars. Sts. 1783, *c.* 51; 1807, *c.* 123. The Courts of Common Pleas had jurisdiction of most other civil actions, with a right of appeal, on fact as well as law, to this court whenever the debt or damages demanded exceeded seventy, or, afterwards, one hundred dollars. Sts. 1811, *c.* 33; 1813, *c.* 173; 1817, *c.* 185; 1820, *c.* 79. The jurisdiction of all crimes, except simple assaults and perhaps some other petty offences, was in this court, or in the Courts of Common Pleas, or in the Municipal Court of Boston. Sts. 1782, *c.* 9; 1799, *c.* 81; 1803, *c.* 154; 1807, *c.* 57; 1812, *c.* 133; 1820, *c.* 79. *Commonwealth* v. *Knowlton*, 2 Mass. 530. *Commonwealth* v. *Johnson*, 8 Mass. 87. *Commonwealth* v. *Holmes*, 17 Mass. 336, 340. *Commonwealth* v. *White*, 8 Pick. 453. *Brien* v. *Commonwealth*, 5 Met. 508, 513, 514.

In the light of these facts, we cannot doubt that the intention of the Constitution, as amended, was to exclude the judges of all organized courts, established to administer the judicial power of the Commonwealth, from sharing in the exercise of the supreme legislative or executive power.

Police courts were created after the adoption of the constitutional amendment in question, and were at first vested with the same criminal and civil jurisdiction as justices of the peace. St. 1821, *c.* 109, §§ 2, 6. Rev. Sts. *c.* 87, §§ 1, 3, 11, 32, 34. St. 1849, *c.* 86. The courts thus established were organized judicial tribunals, having attributes and exercising functions independently of the magistrates designated to hold them, and were thus distinguished from justices of the peace, on whom personally certain judicial powers are conferred by law; and the judges of such courts must by the Constitution be appointed during good behavior, instead of for seven years, as in the case of jus-

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tices of the peace. *Opinion of Justices*, 3 Cush. 584. *Gladhill, petitioner*, 8 Met. 168, 170. *Bannegan* v. *Murphy*, 13 Met. 251. The inevitable conclusion is that each of these courts is a court of this Commonwealth other than the Court of Sessions, within the meaning of the amendment of the Constitution.

This conclusion would be confirmed, if necessary, by the consideration that, by later statutes, all police courts have been vested with jurisdiction, concurrently with the Superior Court, of many crimes, and of all personal actions and proceedings in civil cases in which the amount demanded or the value of the property claimed does not exceed three hundred dollars, and so exercise at the present day a considerable portion of the judicial power which in 1821 was vested in the Courts of Common Pleas or in the Municipal Court of Boston. Gen. Sts. *c.* 116, §§ 13, 14. St. 1871, *c.* 144.

A special justice of a police court holds his office by the like appointment and tenure as the standing justice, and, in case of his absence or disability, or at his request, may hold a session and exercise all the powers of the court, and is in every sense a judge thereof. Gen. Sts. *c.* 116, § 22. *Dike* v. *Story*, 7 Allen, 349. *Commonwealth* v. *McCarty*, 14 Gray, 18.

The defendant therefore could not lawfully hold at one and the same time the office of a special justice of the Police Court of Lynn and a seat in the House of Representatives; and the remaining question in the case is, which of these two public trusts he lawfully held, after unlawfully attempting to hold both. If he did not lawfully hold a seat in the House, he could be unseated only by the House itself, which is by the Constitution the final judge of the elections, returns and qualifications of its own members. Const. Mass. *c.* 1, § 3, art. 10. But if he unlawfully holds a judicial office, this proceeding by information in behalf of the Commonwealth is the proper process to oust him from the office which he occupies *de facto*, but to which he has no legal right. *Fowler* v. *Bebee*, 9 Mass. 231, 235. *Commonwealth* v. *Fowler*, 10 Mass. 290, 301. *Sheehan's case*, 122 Mass. 445. *Answer of Justices*, 122 Mass. 600, 604.

By the common law, when two offices or public trusts are incompatible with each other, a person holding the one is not disqualified to be appointed or elected to the other, but his ac-

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ceptance of the second office is in law an implied resignation of the first, whenever it may be resigned by the mere act of the incumbent, without the assent or concurrence of a superior authority. *Milward* v. *Thatcher*, 2 T. R. 81. *The King* v. *Hughes*, 5 B. & C. 886; *S. C.* 8 D. & R. 708. *The King* v. *Tizzard*, 9 B. & C. 418; *S. C.* 4 Man. & Ry. 400. *The King* v. *Patteson*, 4 B. & Ad. 9; *S. C.* 1 Nev. & Man. 612. *Worth* v. *Newton*, 10 Exch. 247. *People* v. *Carrique*, 2 Hill (N. Y.) 93. *People* v. *Nostrand*, 46 N. Y. 375, 381. *Stubbs* v. *Lee*, 64 Maine, 195. *Commonwealth* v. *Kirby*, 2 Cush. 577. There may be municipal or county offices that a person cannot decline to accept, and therefore has no right to resign at his own will. But under the Constitutions of the United States and of this Commonwealth, at least, a judicial office, depending upon the appointment of the Executive, no person is obliged to accept, or to hold longer than he pleases, but has the absolute right to resign at any time. *United States* v. *Wright*, 1 McLean, 509.

It follows that the defendant, by taking the seat to which he had been elected in the House of Representatives, legally vacated his judicial office, unless there is something in the Constitution itself which controls the general law. Upon examination of all the provisions of the Constitution on the subject, we are of opinion that they affirm, rather than reverse or qualify, the rule of the common law as applicable to the case. In order to make the discussion intelligible, it is necessary to recite those provisions.

The original Constitution of the Commonwealth, adopted in 1780, contains, in *c.* 6, art. 2, the following provisions as to incompatibility of offices:

"No Governor, Lieutenant Governor, or Judge of the Supreme Judicial Court, shall hold any other office or place under the authority of this Commonwealth, except such as by this Constitution they are admitted to hold, saving that the judges of the said court may hold the offices of justices of the peace through the state; nor shall they hold any other place or office, or receive any pension or salary from any other state or government or power whatever.

"No person shall be capable of holding or exercising at the same time, within this state, more than one of the following

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offices, viz. judge of probate, sheriff, register of probate or register of deeds; and never more than any two offices which are to be held by appointment of the Governor, or the Governor and Council, or the Senate, or the House of Representatives, or by the election of the people of the state at large, or of the people of any county, military offices and the offices of justices of the peace excepted, shall be held by one person.

"No person holding the office of Judge of the Supreme Judicial Court, secretary, attorney general, solicitor general, treasurer or receiver general, judge of probate, commissary general, president, professor or instructor of Harvard College, sheriff, clerk of the House of Representatives, register of probate, register of deeds, clerk of the Supreme Judicial Court, clerk of the inferior Court of Common Pleas, or officer of the customs, including in this description naval officers, shall at the same time have a seat in the Senate or House of Representatives; but their being chosen or appointed to, and accepting the same, shall operate as a resignation of their seat in the Senate or House of Representatives, and the place so vacated shall be filled up.

"And the same rule shall take place in case any Judge of the said Supreme Judicial Court, or judge of probate, shall accept a seat in Council, or any councillor shall accept of either of those offices or places."

The whole of the eighth article of the amendments adopted in 1821 is as follows: "No judge of any court of this Commonwealth (except the Court of Sessions) and no person holding any office under the authority of the United States (postmasters excepted) shall at the same time hold the office of Governor, Lieutenant Governor, or councillor, or have a seat in the Senate or House of Representatives of this Commonwealth; and no judge of any court in this Commonwealth (except the Court of Sessions) nor the attorney general, solicitor general, county attorney, clerk of any court, sheriff, treasurer and receiver general, register of probate, nor register of deeds, shall continue to hold his said office after being elected a member of the Congress of the United States, and accepting that trust; but the acceptance of such trust, by any of the officers aforesaid, shall be deemed and taken to be a resignation of his said office; and judges of the Courts of Common Pleas shall hold no other office under the

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government of this Commonwealth, the office of justice of the peace and militia offices excepted."

It is manifest that none of these provisions make the holder of one office or trust, of the class first mentioned in each clause, ineligible, in the strict sense, that is, incapable of being elected or appointed to an office or trust of the other class; for the Constitution never says that such a person shall be ineligible, or shall be incapable of being, or disqualified to be, elected or appointed, but that he shall not "hold," or "continue to hold," or "be capable of holding or exercising" a certain office or trust, or "have a seat" in the Senate or House. It was accordingly decided by the House of Representatives in 1800 that a judge of probate, who resigned his judicial office after being elected a representative and before the meeting of the Legislature, was qualified to take his seat in the House. *Case of Sullivan*, Mass. Election Cases, (ed. 1853,) 39.

In no case does the Constitution provide that the acceptance of the second office or trust shall be void, and the incumbent shall continue to hold the first. But whenever anything is said as to which office or trust a person shall hold, who, already holding one, accepts another incompatible with it, it is, in accordance with the rule of the common law, that such acceptance "shall operate as" or "shall be deemed and taken to be a resignation" of the first. Nor can any implication arise, from the expression of this rule in some cases, that a different rule is intended where none is expressed; because in every case, in which the rule of the common law is recognized, there was special reason for the introduction of the clause that contains such recognition.

In that part of the original Constitution, for instance, which, after declaring that no person holding the office of judge of this court, or either of certain other offices therein enumerated, shall at the same time have a seat in the Senate or House of Representatives, adds, "but their being chosen or appointed to, and accepting the same, shall operate as a resignation of their seat in the Senate or House of Representatives, and the place so vacated shall be filled up," the purpose of the addition would appear to have been to make it clear that the Senate or House might issue a precept for a new election to fill the vacancy; and such imperfect notes as have come down to us of the Debates in the Con-

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vention which framed the Constitution support this view. Journal of Convention of 1779–80, pp. 81, 139, 144, 162, 166. That, without such a provision, the right to issue a new precept might be considered doubtful is evident from the *Opinion of the Justices*, 3 Pick. 517.

The further provision, "And the same rule shall take place in case any Judge of the said Supreme Judicial Court or judge of probate shall accept a seat in Council, or any councillor shall accept of either of those offices or places," was apparently intended to remove any doubt as to whether a seat in the Council should be considered as an "office or place," within the meaning of the first paragraph of the same article, and to declare in the clearest terms the incompatibility of the office of judge of probate, as well as of the office of judge of this court, with a seat in the Council, and thus cure the evil that had prevailed under the Province Charter, when Thomas Hutchinson was at one time Lieutenant Governor and a member of the Council (then also a branch of the Legislature) as well as Chief Justice of the Superior Court of Judicature and Judge of Probate for the county of Suffolk. Quincy, 242–244, 426 note. 2 John Adams's Works, 124, 151.

The eighth article of amendment is in the nature of an addition to the article of the original Constitution on the subject of incompatibility of offices. Its objects, as apparent from its terms, and as stated by Mr. Webster in bringing it before the Convention which submitted it to the people, were, 1st, to extend the disqualification of judges to sit in the Legislature or the Council (which had been previously limited to judges of this court and judges of probate) to judges of other courts; 2d, to prevent the holding by the same person at the same time of important offices or trusts under the state government and under the Constitution of the United States, which had been established since the adoption of the Constitution of the Commonwealth; 3d, (which is not material to the present inquiry,) to restrict the number of offices that might be held by judges of the Courts of Common Pleas. Debates in Convention of 1820 (ed. 1853) 124, 187.

The express declaration, in this article of amendment, that the acceptance of the trust of a member of Congress, by any of

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the state officers mentioned, "shall be deemed and taken to be a resignation of his said office," may well have been inserted to make it manifest that the Commonwealth did not assume to deal with the right to a seat in Congress, the qualifications for which are defined by the Constitution of the United States. And the omission of a corresponding declaration in the earlier part of the same article would seem to have been dictated by the same spirit, in order to avoid saying, what the Commonwealth would have no power to enforce, that an office under the authority of the United States should be vacated by holding an office or seat in the state government.

The cases cited in the defendant's behalf, in which persons holding offices under the United States have not been allowed by the Massachusetts House of Representatives to hold seats therein, do not, giving them the fullest weight, tend to support his position. All of them but one were decided before the Constitution of the Commonwealth contained any provision as to the incompatibility of national with state offices; and in none of them did it appear that the office under the United States was accepted first, except in the case of David Sewall, then Judge of the District Court of the United States for the District of Maine, as to whom the question was raised and decided in 1790, upon his appearing to take his seat as a member of the House; so that it is evident that the point was whether, without resigning his judicial office, he could hold a seat in the House of Representatives, in the absence of any constitutional provision upon the subject. Mass. Election Cases, 28–30, 251.

On the other hand, the words in question have practically received, as applied to the highest offices of the Commonwealth, the construction that we adopt. Mr. Justice Sumner under the Constitution of 1780, and Justices Lincoln and Morton since the adoption of the amendment of 1821, were elected to and accepted the office of Governor, while holding the office of a justice of this court, and were recognized by the whole people of the Commonwealth as having lawfully assumed its chief executive office. Mr. Justice Morton certainly resigned his judicial office in no other way than by accepting the office of Governor. 1 Met. 1. And it may fairly be presumed that his action was in accordance with that of his predecessors in similar cases.

Demurrer overruled.

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JOSEPH MAGGI *vs.* BENJAMIN CUTTS.

Essex. Nov. 10, 1877. — Jan. 5, 1878. MORTON & SOULE, JJ., absent

In an action for personal injuries caused by an obstruction in a highway, where the evidence is conflicting as to the cause of the accident and the general character of the horse which the plaintiff was driving at the time of the accident, evidence of the character and habits of the horse, as well after as before the accident, is admissible.

TORT for personal injuries alleged to have been sustained by an obstruction in the highway, placed there by the defendant. Trial in this court, before *Ames*, J., who allowed the following bill of exceptions:

"It appeared in evidence in this case, that on the evening of November 19, 1875, at about half past six o'clock, the plaintiff was riding in a wagon through Sewall Street, which, for the purpose of this case, was admitted to be a public way in Salem, and which was about twenty or twenty-one feet wide, and there fell or was thrown from his wagon and received the injuries for which he seeks to recover damages.

"For a few days previous to this accident, and upon said November 19, the defendant, whose blacksmith shop was upon Sewall Street, had been making an excavation for a cellar under his building, and had thrown the dirt, gravel and loam therefrom into the street, and at the time above named there was a pile of such gravel or loam standing in the street about two and a half feet high, extending about ten feet along the street, and from a third to half the distance across the street, the exact dimensions of the pile being in dispute.

"It was contended by the plaintiff, and he introduced evidence to show, that, not observing the obstacle, and using due care, he had driven his horse upon the pile aforesaid so far that the forward wheels touched or went into it; that the horse had fallen upon the pile and the plaintiff was thus thrown violently upon the ground; that the horse was helped upon his feet and stood quietly till the plaintiff was put into the wagon.

"In the course of the trial, the plaintiff, in putting in his case, called witnesses who testified, among other things, that the plaintiff had owned the horse, which he was driving, two years,

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that the horse was a good driving horse, that he was a good, kind and clever horse, and had no vices; on cross-examination the plaintiff testified that when he first bought him he showed some signs of being a kicking horse, and did in fact kick upon one or two occasions, and that he was then placed for a few days in the hands of one Currier, who was accustomed to horses; and Currier testified that he showed some indications, by whisking his tail and otherwise, that he was a kicking horse, and that he kicked once while with him; but that after driving him he did not think he was a kicking horse, and that he tried him for about a month in order to ascertain.

"Dominick Maggi, a witness for the plaintiff, who testified on the examination in chief as to the good character of the horse, upon cross-examination testified that on one occasion, subsequent to the accident, the horse, which was then harnessed in a pung or sleigh, whisked his tail, had gone round, had stopped more than once, and that he found the horse had got his leg over the shaft, and that after the shaft was put into its proper place he had no further difficulty.

"The defendant denied the truth of the plaintiff's account of the manner in which the accident had occurred, and introduced evidence tending to show that neither the plaintiff nor the wagon touched the pile of dirt at all; and, as one mode of accounting for the accident, contended that the horse might have stumbled or fallen, or stopped suddenly, without reference to the pile of dirt.

"There was no evidence tending to show that the horse at the time of the accident baulked or stumbled, or became unmanageable or contrary, or that the accident was caused by any vice, fault or defect on the part of the horse, or that any such vice, fault or defect contributed to the accident; but on the contrary it appeared that immediately after the accident he was perfectly quiet and controllable.

"In this connection, and for the purpose of controlling the plaintiff's testimony as to the character of the horse, and for the purpose of showing generally that the horse was vicious and unsafe at the time of the accident, and was known to be such by the plaintiff, the defendant offered evidence of one Teague, who testified that, just before Thanksgiving time in 1875, he

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had seen the horse fall at the corner of North Street, in Salem, and of one Williams, who testified that in August, 1875, he had seen the horse kicking; he then offered to prove instances of the horse's kicking and stumbling since the accident, and also that the horse baulked, that he had several times behaved in a vicious, unruly and restive manner, and had bolted in the street.

"All evidence of this description referring to any time before the accident was admitted, but the evidence of all such acts as were subsequent to the date of the accident the presiding judge refused to admit."

The jury returned a verdict for the plaintiff for $7608.33; and the defendant alleged exceptions.

W. D. Northend & J. A. Gillis, for the defendant.

S. B. Ives, Jr. & L. S. Tuckerman, for the plaintiff.

LORD, J. The fact that a horse driven by the plaintiff misbehaved at the time an injury was received, though such misbehavior contributed to the injury, does not necessarily preclude the party from recovering. The misbehavior may have been accidental, or from causes for which the plaintiff was under no responsibility. The misbehavior, to bar the plaintiff from recovering, must be either through the fault of the plaintiff, or by reason of a vice of the horse, for which the plaintiff is in law responsible. Whether or not it is a vice depends largely upon the question whether the misbehavior was only in a single instance, or occasional, depending upon other causes, or whether it was the habit of the horse. And, in order to establish the fact that the misbehavior was occasioned by the viciousness of the horse, it has been held to be competent to show that such misbehavior is habitual, and instances of misbehavior, as well after the injury as before, have been held competent to prove the habit. *Todd* v. *Rowley*, 8 Allen, 51. The limit of time within which such misbehavior may be proved must depend largely upon the discretion of the presiding judge. It is not, however, wholly within such discretion. It is the right of a party to prove such instances immediately before and immediately after; but when instances are offered so remote from the time of the injury as, in the opinion of the presiding judge, to mislead or distract the minds of the jury, he may in his discretion reject the evidence; and if, in the opinion of the court,

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such evidence was so remote as to be a fit subject for the discretion of the presiding judge, that discretion will not be revised by the full court.

In this case, the evidence offered was not rejected because, in the opinion of the presiding judge, it was too remote, but was rejected as incompetent, without the exercise of any discretion upon the question of remoteness. It therefore is to be considered whether the evidence was in its nature competent and admissible. The only doubt upon this subject is raised by the peculiar phraseology used in the bill of exceptions. The language is this: "There was no evidence tending to show that the horse at the time of the accident baulked or stumbled, or became unmanageable or contrary, or that the accident was caused by any vice, fault or defect on the part of the horse, or that any such vice, fault or defect contributed to the accident." This certainly cannot be construed as literally accurate. If it were to be, the whole evidence on the part of the plaintiff, as to the qualities of the horse, was entirely immaterial, and all evidence of the vicious character of the horse, as well before as after the injury, was incompetent and inadmissible, for the character of the horse is wholly and utterly immaterial, unless his conduct at the time contributed to the injury.

The phrase thus construed is also entirely inconsistent with another portion of the bill of exceptions, which is in these words: "The defendant denied the truth of the plaintiff's account of the manner in which the accident had occurred, and introduced evidence tending to show that neither the plaintiff nor the wagon touched the pile of dirt at all; and, as one mode of accounting for the accident, contended that the horse might have stumbled or fallen, or stopped suddenly, without reference to the pile of dirt." This certainly shows, not only that the defendant contended that the injury was caused not merely by the contributory fault of the horse, but solely by reason of his vicious character; and if it were true that neither the plaintiff nor his carriage reached the pile of dirt, as the defendant introduced evidence tending to show, then it was clearly competent for the defendant to show the vices of the horse, in order to show that it was by reason of those vices, and not by the obstruction in the way, that the plaintiff received his injury, and this was a fact to

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be determined by the jury, and not to be passed upon by the court.

Undoubtedly the true construction of the paragraph in the bill of exceptions is, that no witness testified to any observed misbehavior of the horse at the time. It does not appear by the bill of exceptions whether the plaintiff was alone at the time of the injury, or whether he was accompanied by any person, or by whom. If he was alone, and testified to the good behavior of the horse, and that the horse actually ran upon the pile of dirt, and other witnesses, subsequently congregated, testified that the carriage had not reached the pile of dirt, and that the wheel tracks showed the carriage stopped before the horse had reached the dirt, the jury might well have found that the pile of dirt was not the cause of the injury. It was a question of fact for the jury. It might have been that the pile of dirt caused the horse to stop without fault upon his part, but it was purely a matter for the jury, who might have found that it was the viciousness of the horse, and not the pile of dirt, which caused the injury; and if, upon a view of all the evidence, they were satisfied that the horse stopped before he reached the pile of dirt, the very fact that the plaintiff attempted to mislead them by testifying that the horse actually ran into the pile of dirt would be a reason why the jury should more carefully scrutinize all the facts in reference to the character of the horse, in connection with the attempt of the plaintiff to mislead them as to the exact locality and mode in which his injury was received.

It is contended, on the part of the plaintiff, that the verdict in this case should not be set aside, because the evidence rejected was immaterial, and because its admissibility was within the discretion of the presiding judge. As to the last point, we have already said that the evidence was not rejected as matter of discretion, but was ruled upon as matter of law, and it nowhere appears that the presiding judge would have rejected the evidence as matter of discretion, unless he had deemed it incompetent in law. Upon the other ground of immateriality, we understand the argument of the plaintiff's counsel to be based solely upon the paragraph upon which we have commented, and which he contends is to be taken as literally true. Even if it could be so claimed, the rejected evidence is evidence which bears upon

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that precise point, and it would be a strange begging of the question, when evidence is offered tending to prove a particular fact, to say that the evidence is immaterial because no other evidence had been offered upon the same subject. The question is, not whether the evidence was sufficient to prove the fact in the opinion of the court, but whether it was evidence proper for the jury to consider, and upon which they might be authorized to find the fact; and when evidence is offered, competent as tending to prove a particular fact, the court cannot say that the evidence is insufficient to prove the fact, unless it is all offered and tendered for the purpose of raising before the ultimate tribunal the question of its sufficiency. That was not done in this case.

There are cases in which the finding of a jury upon one question may render immaterial the reception or rejection of evidence upon some other question in the case. The more common example of this is when competent evidence is rejected or incompetent evidence is received upon the subject of damages, and the jury find a general verdict for the defendant. In such cases the whole evidence upon the question of damages becomes immaterial. There are other cases of the same kind where the finding of the jury upon one question renders wholly immaterial all evidence in relation to other questions arising in the case. The court should be very slow to say that any evidence which is competent upon a question decided against a party is immaterial, and never unless the whole evidence is presented, and the question of its sufficiency distinctly raised. In this case we think the evidence rejected was clearly competent and material, and its sufficiency should have been left with the jury.

Exceptions sustained.

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MOSES E. EMERSON *vs.* PAUL D. PATCH, executor.

Essex. Nov. 8, 1877. — Jan. 14, 1878. MORTON & SOULE, JJ., absent.

In an action on an account annexed for wood sold to A., the report of an auditor stated that the plaintiff sold the wood in question to B., who was then engaged in manufacturing bricks for A. under a written agreement, by which A. was to furnish all necessary materials for making the bricks, except the clay; that the wood was delivered at the brick-yard, occupied by B., and there used by him in making the bricks for A.; that A. frequently visited the yard while the wood was being so used, and in fact sold a part of the bricks after they had been manufactured; that the plaintiff, at the time of the sale to B., was ignorant of the agreement between A. and B., and of the fact that any person except B. had an interest in the business, and was first informed of it within a week before suit was brought; that, in the meantime, A. and B. had made a final settlement of their accounts, in which A. gave up to B. certain promissory notes held against him, and B. released to A. his claim for making the bricks, and executed to him a receipted bill for the wood, which was dated prior to the time of settlement; and found for the plaintiff. The judge ruled that, on these facts, the auditor was not justified in finding for the plaintiff, and ordered a verdict for the defendant. *Held*, that the ruling was erroneous, and that the evidence should have been submitted to the jury.

CONTRACT, on an account annexed, for wood sold and delivered to Charles Dustin, the defendant's testator.

At the trial in the Superior Court, before *Gardner*, J., the plaintiff put in evidence the report of an auditor in his favor, and rested his case. The report of the auditor stated that the plaintiff sold the wood, charged in the account annexed, to Edward Foye, who was then engaged in manufacturing bricks for Dustin, under a written agreement, by the terms of which Dustin agreed to furnish all necessary materials for making the bricks, except the clay; that the number of cords and the price were agreed on by the plaintiff and Foye, and the wood was delivered at the brick-yard occupied by Foye, and was there used by him in burning the bricks made by him for Dustin under the agreement; that Dustin, during the progress of making the bricks, was frequently at the brick-yard, and observed what was being done, and, after the burning was finished, sold a part of the bricks; a part was sold by Foye, and the remainder, after the death of Dustin, were taken and sold by the defendant; that, at the time of the sale and delivery of the wood in question, the plaintiff was not informed of the agreement between Dustin and Foye, and had no knowledge that Dustin or any other person

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had any interest or responsibility in or about the business except Foye, and his first information upon that subject was within one week before the commencement of this action, when he learned of the existence of the written agreement between Dustin and Foye; that in the meantime, on November 12, 1874, Dustin and Foye made a settlement of their accounts, in which Dustin released and gave up to Foye certain promissory notes which he held against him, and Foye released to Dustin his claim for making the bricks, and also executed to Dustin a bill receipted for the wood in question or the larger portion of it, (dated October 27, 1874,) and made a final adjustment of their account of the business of manufacturing the bricks; and upon these facts found that the plaintiff was entitled to recover for the price of the wood so sold and delivered to Foye, and stated the account.

The defendant offered no evidence, but contended that the findings of the auditor were not justified by the facts reported by him. The plaintiff contended that he was entitled to a verdict.

The judge ruled that, on the facts and evidence reported by the auditor, with all such inferences as he might legally draw from the same, the auditor was not justified in finding for the plaintiff, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. C. Perkins, for the plaintiff.

H. Carter, (*J. P. Jones* with him,) for the defendant.

ENDICOTT, J. The plaintiff seeks to recover against the estate of Charles Dustin for certain wood sold by him to Edward Foye, on the ground that Foye was the agent of Dustin in purchasing the wood, which fact was not disclosed to him at the time, but as soon as ascertained this action was brought.

By the contract between Foye and Dustin, Foye was to make bricks, and Dustin was to furnish all the necessary materials for making, except the clay. The contract provides the manner in which Foye shall be paid for his work, and the bricks, when finished, were the property of Dustin. It is not denied by the defendant that wood is a necessary material in the manufacture of bricks, and it was the duty of Dustin, by the terms of the contract, to supply it. After the contract was made, Foye bought the wood from the plaintiff; it was all consumed in burning the

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bricks, which fact must have been known to Dustin, as he was frequently in the yard observing what was done. It was a material he was bound to furnish; it was consumed in making his bricks with his knowledge. Foye had a duty to obtain it, and whether Foye acted as his agent in buying it of the plaintiff was a question for the auditor to determine on the facts before him, the substance of which is stated in his report. The report was therefore proper evidence for the jury on that branch of the case.

The second question argued at the bar we are not called on to decide. It was contended by the defendant, that, assuming Foye to have been the agent of Dustin in the purchase, yet that Dustin was relieved from liability, because he paid Foye for the wood before the plaintiff brought his action, or knew that Dustin was the principal in the transaction. But that question can arise only when it is ascertained as a fact that such a payment has actually been made, and in good faith. The auditor does not say in his report that Dustin had paid the money to Foye for the wood, but that Foye gave him a receipted bill for the same. This receipt was given by Foye to Dustin on November 12, when the settlement was made for the bricks, and for some reason dated back to October 27. Whether the auditor found that the money was actually paid, or that it was a mere colorable transaction, does not appear. And we cannot say, as matter of law, that, in passing upon this question, he was bound to find that it was paid, merely on the evidence furnished by this receipt. *Exceptions sustained.*

ADELINE POOR & others *vs.* SAMUEL S. BLAKE.

Essex. Nov. 9, 1877. — Jan. 15, 1878. MORTON & SOULE, JJ., absent.

The provisions of the Gen. Sts. *c.* 43, § 65, requiring a report of the laying out or altering of a town way to be filed in the town clerk's office seven days before a meeting of the voters to take action thereon, are not applicable to ways laid out by the authorities of a city.

Where a way has been laid out or altered by the authorities of a city under an order duly passed, an entry upon any part of the land embraced in the location or alteration within two years is a sufficient entry upon all the lands included in the laying out or alteration under the St. of 1869, *c.* 303.

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TORT for breaking and entering the plaintiffs' close in Newburyport and removing a fence therefrom. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on agreed facts in substance as follows:

The defendant, as an officer of the city of Newburyport, removed the fence from the plaintiffs' premises, contending that it was within the limits of State Street.

Both branches of the city council of Newburyport on April 6, 1874, passed an order, which was approved by the mayor on April 15, 1874, to widen State Street, in accordance with a certain plan, and for that purpose to take land belonging to the plaintiffs and other persons mentioned. The plan was filed in the office of the city clerk on April 6, 1874.

The city entered upon and took possession of all the parcels of land described in the order widening State Street, within two years after April 6, for the purpose of widening the street, except the land belonging to the plaintiffs, upon which no entry was made and of which no possession was taken until August, 1876.

If upon these facts the defendant was justified in law in committing the trespass, the plaintiffs were to become nonsuit; otherwise the case was to stand for the assessment of damages.

S. B. Ives, Jr. & S. Lincoln, Jr., for the plaintiffs.

E. F. Stone, for the defendant.

COLT, J. The exclusive power to lay out, alter or discontinue streets or town ways, and to estimate damages sustained by any individual thereby, is given to the mayor and aldermen, with the concurrent vote of the common council of the city of Newburyport. St. 1851, *c.* 296, § 14. No provision is made as to the manner in which this authority shall be exercised, and it must therefore be exercised in conformity with and be governed by the regulations prescribed in the General Statutes, in relation to the laying out of ways, so far as those regulations are applicable to ways laid out by the city. *Barnes* v. *Springfield*, 4 Allen, 488.

The provisions of the Gen. Sts. *c.* 43, § 65, require that town ways laid out by the selectmen shall not be established as such until the laying out is reported to and accepted by the

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town at a meeting regularly called for that purpose; nor unless such laying out is filed in the office of the town clerk seven days before the meeting. Thus town ways, though in the first instance laid out by the selectmen, do not really become town ways without the further action of the town. And it is with reference to that future action and for giving precise information to the voters, as well as to all parties interested, that the location is required to be filed seven days in advance of the final action of the town.

But, in reference to ways laid out by the city authorities as authorized by this charter, it is plain that this seven days' provision is not applicable; all that the charter requires is the action of the mayor and aldermen with the concurrent vote of the common council. To the two branches of the city government is given the exclusive power to act at such time as each may choose without restriction or condition. No further action of the city and no action whatever of the voters are required, and no delay in the action of either branch is provided for. The requirement for filing the location seven days before town meeting in the town clerk's office is in terms confined to ways laid out by selectmen of towns.

An entry upon any part of the land embraced in the location or alteration was an entry upon all the lands included in the laying out or alteration made upon the same petition. There was therefore, by the agreement of the parties, a sufficient entry on the plaintiffs' land within two years from the time when the right to take possession first accrued. St. 1869, *c.* 303.

Judgment affirmed.

CORNELIUS E. WOOD *vs.* INHABITANTS OF MEDFIELD.

Suffolk. Nov. 15, 1877. — Jan. 1, 1878. COLT & AMES, JJ., absent.

If a person employed by the school committee of a town to teach for a fixed time, at a stated salary, is, before the expiration of that time, dismissed by the school committee, under the Gen. Sts. *c.* 38, § 25, he cannot maintain an action against the town for compensation for the remainder of the time.

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CONTRACT, on an account annexed, for $150, being the balance alleged to remain unpaid of the salary of the plaintiff, as teacher of the high school in the defendant town, for the year ending July 7, 1874. Trial in the Superior Court, without a jury, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The defendant town admitted that its school committee made a contract with the plaintiff to teach the high school for said year, and that the plaintiff was ready to execute the contract. The following letter was introduced in evidence by the plaintiff, and admitted without objection by the defendant: "Medfield, Aug. 17, 1873. C. E. Wood, Esq. My Dear Sir, The school committee have had under consideration your proposal. It was voted by the board that the secretary notify you that the committee will give you the sum of $1,200 to teach the high school in Medfield, on condition that you teach from July 7, 1873, to July 7, 1874, and not without. Please reply immediately. The first term will commence Sept. 1st. Yours truly. R. T. Lombard." It was admitted that the signer of the letter was a member and secretary of the school committee, and that he had authority to write the letter, and that it truly expressed the vote of the committee, and was sent to and received by the plaintiff in due season; that the plaintiff replied to the letter, accepting the employment on the condition named, and that he had received for his services only the sum of $1050.

The defendant, against the objection of the plaintiff, offered evidence tending to prove that on May 29, 1874, the school committee voted to close the school and discharge the teacher, and thereupon closed the school, and notified the plaintiff that his services were no longer required; but did not prove nor offer to prove the reason for their action. The defendant contended that, under the Gen. Sts. *c.* 38, § 25, the school committee had the power to discharge the plaintiff at any time, at its discretion, without assigning any reason. The plaintiff objected to the admission of this evidence, and contended that it would not constitute a defence to the action, and that the committee had no right to deprive the plaintiff of his full salary, except for some incapacity or misconduct of the plaintiff, or other breach of contract on his part; but the judge ruled otherwise, and admitted

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the evidence, and held that it constituted a defence to the action, and ordered judgment for the defendant. The plaintiff alleged exceptions.

G. A. Torrey, for the plaintiff.

A. French, for the defendant.

LORD, J. Whatever questions might have been raised in the case, the only question presented in the Superior Court was whether the school committee was authorized by the Gen. Sts. *c.* 38, § 25, to discharge a teacher, who had been hired for a particular term, before the expiration of that term.

Upon this question there can be no doubt. The Legislature has seen fit to provide, for reasons of public policy satisfactory to itself, that "the school committee may dismiss from employment any teacher whenever they think proper, and such teacher shall receive no compensation for services rendered after such dismissal." There is in this language no exception nor qualification. No reason is required other than that which comes from their official responsibility; and no school committee has the right to bind either themselves or their successors by any contract which shall relieve them from such duty or responsibility. By law "the annual meeting of each town shall be held in February, March or April." Gen. Sts. *c.* 18, § 20. "Every town shall, at the annual meeting choose, by written ballots, a board of school committee, which shall have the general charge and superintendence of all the public schools in town. Said board shall consist of any number of persons divisible by three, which said town has decided to elect, one third thereof to be elected annually, and continue in office three years." Gen. Sts. *c.* 38, § 16. It will thus be perceived that, although the board is to some extent a permanent one, it is subject to some change annually during the months of February, March and April. If, therefore, it is competent for a school committee in July to make a contract extending beyond the time when the board may be changed by the substitution of some new members, and the new board of school committee can be thus deprived of its power over, and its responsibility for, the employment of teachers satisfactory to the board, it is difficult to say what is the limit of the power of school committees in relation to special contracts. The court has no power to interpolate into the law a special

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reason for the exercise of such power, other than that which the Legislature has prescribed, to wit the official duty and responsibility of the board of school committee. Whether or not they have power to bind themselves personally by any contract, it is entirely clear that they have no power to bind the town to any other contract than that which they are authorized to make in behalf of the town; and no power to compel the town to pay for the services of a teacher after such teacher shall have been discharged by the board of school committee. Such exercise of authority would be in direct violation of the statute; and teacher as well as school committee must know that there is no authority in law by which a school committee can bind the town to pay for the services of a teacher after he shall have been discharged by the school committee acting under its obligations of duty. *Exceptions overruled.*

JAMES B. COLE & another *vs.* HALSEY J. BOARDMAN & others.

Suffolk. Nov. 13, 1877. — Jan. 2, 1878. COLT & AMES, JJ., absent.

In an action on two promissory notes, it appeared that the defendants were stockholders in, and directors of, a corporation in which the plaintiff was also a stockholder; that the plaintiff and the defendants with other stockholders voted at a corporate meeting to authorize the directors to lease all the lands of the corporation; that the directors executed a lease to an association composed of themselves, which lease was ratified by a stock vote of the corporation, the plaintiff voting in favor of it and giving assurances that he would become a member of the association; that, at this time, the plaintiff had an interest in a decree obtained in a court of chancery against the corporation as trustee, the amount of which had not been judicially determined; that the plaintiff prevailed on the defendants, acting as directors, to assent to an entry of judgment for the sum claimed, by reason of which the plaintiff was enabled to obtain precedence over several cases then pending against the corporation; that the plaintiff assigned to the defendants this judgment and another judgment which he held against the corporation, and took the notes in suit in payment therefor, made by the association and indorsed by the defendants; that the plaintiff represented to the defendants that the association would be thereby enabled to acquire title to all the property of the corporation by a legal early sale thereon, and exclude the other stockholders from any interest therein, and prevent other creditors from collecting their claims; and that the plaintiff's attorneys gave assurances that they would make the plaintiff become a member of the association. *Held*, that no fraud appeared on the part of the plaintiff which made the consideration of the notes illegal as against public policy, and that the plaintiff was entitled to judgment.

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CONTRACT against Halsey J. Boardman, J. B. Loomis, J. W. Beals and Edward Page, on two promissory notes, signed "Pequest Iron Association, J. W. Beals, treasurer," payable to the order of the defendants and by them indorsed. The first note, dated September 29, 1875, was for $446.51, payable four months after date; and the second, dated September 30, 1875, was for $2734.13, payable three months after date. Writ dated March 11, 1876. Trial in this court, without a jury, before *Colt*, J., who reported the case for the consideration of the full court in substance as follows:

The plaintiffs and the defendants were stockholders in the Pequest Mining and Manufacturing Company, a corporation established under the laws of the State of New Jersey. The Pequest Iron Association, the maker of the notes in suit, was a copartnership, organized for the purpose of taking a lease of the real estate of the corporation, purchasing its personal property and conducting the business of manufacturing iron in the same manner as had previously been done by the corporation, which was then in debt and in embarrassed circumstances. The plaintiffs and defendants met at Jersey City in the State of New Jersey, on July 16, 1875, and voted, with other stockholders, to authorize the directors of the corporation to execute a lease of its lands. The directors made a lease of said lands, dated July 20, 1875, but not executed until afterwards, to the defendants and one Edward E. Butman, acting together as said association, all of the lessees being directors of the corporation, except the defendant Page, the defendant Boardman being, at the time, president, and the defendant Loomis, treasurer of the corporation. At another meeting of the stockholders held in Jersey City, August 27, 1875, the lease above mentioned was ratified by a majority vote of the stock interest, the plaintiffs voting in favor thereof, and giving assurances that they would become members of the association.

At this time the plaintiffs had an interest to the amount of $2734.13, in a decree obtained in a court of chancery, against one McHose, in which proceeding the corporation was held as trustee. The amount due from the corporation to McHose had not been judicially determined at the time of making the lease, but there was evidence that the plaintiffs prevailed upon the

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defendants, acting as directors of the corporation, to assent to an entry of judgment for the sum claimed, the agreement being executed by the president in August, 1875, after the association of which he was a member was formed. By this agreement, the decree, including the claim of the plaintiffs, took precedence of several suits then pending, and the plaintiffs were enabled to make a levy upon the real and personal estate of the corporation in the early part of the following September.

There was evidence that the plaintiffs, at the time the notes in suit were dated and given, represented to the defendants that if the association would buy the judgment upon the decree in which the plaintiffs were interested, and a certain other judgment which they held against the corporation for $446.51, the association would be enabled to acquire title to all the property of the corporation by a legal early sale thereon, and exclude all other stockholders in the corporation from any interest therein, and prevent other creditors of the corporation from collecting their claims; the attorneys of the plaintiffs who obtained the judgment at the same time also giving assurances that they would make the plaintiffs become members of the association; that the defendants, for the purposes named, gave the notes in suit to the plaintiffs, indorsed the same individually, and took an assignment of the judgments.

Upon this evidence, the defendants asked the judge to rule that the consideration of the notes was illegal and against public policy; but the judge refused so to rule; and found upon the evidence that there was a valid consideration for the notes in suit.

If on these facts a jury would be authorized to find that the consideration of the notes in suit was illegal, the case was to stand for trial; otherwise, judgment to be entered for the plaintiffs for the amount of the notes and interest.

W. S. Macfarlane, for the plaintiffs.

B. Dean, for the defendants, contended that the consideration of the notes was against public policy and illegal; and cited *Fuller* v. *Dame*, 18 Pick. 472; *Guernsey* v. *Cook*, 120 Mass. 501.

MORTON, J. The only objection of the defendants to a judgment against them is that the notes in suit were founded upon an illegal consideration. It appeared at the trial that the plain-

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tiffs had obtained two judgments against the Pequest Iron and Manufacturing Company, a corporation established under the laws of the State of New Jersey. There is nothing to show that these judgments were obtained fraudulently. The fact that the defendants, as directors of the corporation, agreed as to the amount for which the larger judgment should be entered for the plaintiffs, and thus enabled them to obtain priority over other creditors of the corporation, does not show fraud. For aught that appears, the amount for which judgment was entered was justly due from the corporation; and, in a case not affected by the provisions of any bankrupt or insolvent law, a debtor has a right to confess judgment and thus give one creditor a preference. Nothing whatever was shown to impeach the smaller judgment.

The plaintiffs then, having two valid judgments against the corporation, levied upon its estate, and afterwards assigned the judgments to the defendants, such assignments being the consideration of the notes in suit. The defendants introduced evidence tending to show that, at the time the notes were given, the plaintiffs represented to them that if they would buy the judgments they would be enabled to acquire a title to all the property of the corporation by a legal early sale thereon, and exclude all other stockholders in said corporation from any interest therein, and prevent other creditors of said corporation from collecting their claims.

But this evidence does not show any fraud upon the part of the plaintiffs. They were pursuing their legal remedies against the corporation. The representations were merely statements that they had acquired certain legal priorities and advantages over the other creditors and stockholders, which, by an assignment of the judgments, would pass to the defendants.

We are of opinion that, upon the evidence, no fraud is shown upon the part of the plaintiffs which makes the consideration of the notes illegal or against public policy, and that they are entitled to judgment for the amounts of both notes.

Judgment for the plaintiffs.

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CHARLES ROBERTS *vs.* OLD COLONY RAILROAD COMPANY

Suffolk. Nov. 13, 1877. — Jan. 2, 1878. COLT & AMES, JJ., absent. ENDICOTT, J., did not sit.

It is no ground for setting aside an award of a majority of arbitrators, which is according to the submission, and unobjectionable upon its face, that after the hearing, while the arbitrators were in consultation, the chairman expressed in a decided manner his views of the law of the case; that one of the arbitrators stated that he should rely upon the chairman's knowledge of the law; that the other arbitrator dissented from the chairman's view; that there was a heated and unfriendly discussion between the chairman and the dissenting arbitrator; and that afterwards the other two arbitrators refused to discuss the question further with the dissenting arbitrator.

TORT for malicious prosecution.

In the Superior Court at January term 1875, the case was referred, by agreement of parties and rule of court, to "Henry W. Paine, Esq., as chairman, and William Washburn and John D. Morton as associates, for hearing and final determination according to the rules and principles of law. The report of said referees or two of them to the said court shall be binding and conclusive upon the parties."

On June 29, 1875, the plaintiff filed in court a motion that the rule be discharged and the cause stand for trial by jury, for the following reasons:

"1. Because, since the hearing of the case, there has arisen a state of feeling between the referees which prevents them from giving a due consideration to the issues in the case.

"2. Because the chairman of the board of referees refused to confer with one of the referees, who differed with him, as to the law applicable to the case, or to hear his views, or to examine his authorities, or to give any consideration thereto.

"3. Because said referees will not give due consideration to the said case and make a proper report therein according to the law and the facts."

The plaintiff, on the same day, gave notice to the counsel of the defendant of the filing of this motion, and requested that no report should be filed until the motion could be heard.

On July 1, 1875, and before the motion could be heard, the defendant filed the following report, signed by Henry W. Paine and John D. Morton:

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"After due notice to the parties, the three referees met them and heard their evidence and arguments; and now, after careful consideration, being unable to agree, the two undersigned referees award and determine of and concerning the action submitted to the determination of them or two of them, and this is their final award and determination in the premises: That the plaintiff take nothing by his writ, and that neither party recover costs of the other; and they further award that said railroad company recover of the plaintiff one half the sum paid by the defendant to the referees as compensation for their services, which one half is seventy-five dollars.

"The third referee, having been present with the undersigned at all the hearings, and at all the deliberations of the referees, declines to sign this report."

The plaintiff thereupon moved to set aside the award for the following reasons: "1. That said report was filed after and pending a motion by the plaintiff to discharge the rule of reference for the reasons set forth in said motion, and before the same was heard or any opportunity had been given to have the same heard.

"2. That said report is against both the law and the equity applicable to the facts found by the referees as shown by the evidence on the trial.

"3. That the majority of the referees refused to consult, as to the law applicable to the facts which they all agreed were proved, with the minority of the referees, or to examine with him the authorities which he produced or which were cited by the counsel on the trial.

"4. That the majority of the referees did not give due consideration to the case before making the said report.

"5. That a majority of the referees refused to report the facts and questions of law to the court for the determination of the court, which the minority requested should be done.

"6. That injustice has been done the plaintiff by the said majority report."

The motions to discharge the reference and to set aside the report were heard together by *Pitman*, J. The plaintiff offered to prove that the referees substantially agreed upon the facts, and offered to prove what the facts so agreed upon by them

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were; and also offered to prove that, after the evidence and arguments of counsel in the case had been heard, the chairman of the referees made the statement, "I have strong doubts whether a railroad corporation can be held for a malicious prosecution under any circumstances;" that he then proceeded to recite a portion of the facts, and, without consulting the other referees and without laying before them the authorities cited by counsel at the hearing, gave his opinion by saying, "I see no malice;" that at this state of the proceedings, one of the referees expressed some doubt as to the soundness of the chairman's opinion, and some discussion of the evidence followed, in the course of which the chairman admitted that a wrong had been done the plaintiff by the agents of the defendant corporation; that, after more fully agreeing upon the facts of the case, one of the referees called upon the chairman for the authorities cited by the counsel at the hearing, but he failed to produce them, but said at the same time that the cases "were as numerous as leaves in autumn;" that the referees then adjourned at the suggestion of the chairman, and nothing further was done at this meeting; that, at the same meeting, Mr. Morton, one of the referees, said to Mr. Washburn, one of the referees, that he did not suppose they should have much to do, as the chairman, Mr. Paine, would settle the law.

That, before the next meeting, Mr. Washburn looked up the authorities cited by counsel and such other authorities as seemed to him to have a bearing upon the case, and notified the chairman of the fact, and at the same time expressed to him at his office his unwillingness to make an award without more careful examination of the bearing of the evidence and the law applicable thereto; that at the next meeting of the referees, called by the chairman at his office, Mr. Washburn proposed, before making an award, to discuss the facts in connection with opinions of the Supreme Courts of Massachusetts and of other states, and some opinions of Mr. Justice Story in the Circuit Court of the United States, as to what constitutes legal malice and probable cause, which opinions he invited the referees to consider; that the chairman refused so to do, in the most positive manner; that at this Mr. Washburn expressed surprise, and called the attention of the other referee to the fact that Mr. Paine said he did

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not want to hear anything from Mr. Washburn in relation to the matter, and Mr. Paine also inquired of him, at the time he so refused to hear him, what he, Mr. Paine, was put there for, if not to settle the law, and said he had been a lawyer forty years, and inquired of what use it would be for him to discuss the law with Washburn; that he still insisted that Mr. Paine was wrong in his law, and asked him if he was not liable to mistake as most men are, and again asked him if he would not hear him; that Mr. Paine replied, "No, I will not discuss the matter at all with you;" that, after repeated refusals of Mr. Paine to hear Mr. Washburn, he, Washburn, told him that he deemed such refusal to be an insult to him, whereupon Mr. Paine arose from his seat, greatly agitated, and seized Washburn violently by the collar and attempted to thrust him out of the office, but did not succeed; that then Mr. Paine hastily opened the door out of the office and approached Washburn in a threatening attitude, when Mr. Washburn asked him to be seated; that Mr. Paine then proceeded to make an award without discussing the case, except to inquire what sum should be fixed for the services of the referees; that Washburn protested against making any award in the case until the law of the case had been fully and fairly considered by the referees, and also asked to have a statement of the facts agreed upon accompany any award that should be made, all of which Mr. Paine refused; that Washburn then asked for an adjournment, which the other two referees also refused, and Mr. Morton said in a petulant manner, "I have spent time enough; Mr. Paine has decided the law, and that is enough for me."

The defendant denied the allegations of the motions and also the statements of the offer of proof, and contended that, if true, they would not, as a matter of law, be sufficient for rejecting the award.

The judge ruled, as a matter of law, that the proof offered, under the objections filed to the acceptance thereof, did not entitle the plaintiff to have the award set aside, and refused to discharge the rule, and ordered judgment on the award for the defendant; and the plaintiff alleged exceptions.

A. A. Ranney & R. Lund, for the plaintiff.

C. F. Choate & J. H. Benton, Jr., for the defendant.

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MORTON, J. The parties having submitted their case to arbitration, and a majority of the arbitrators having made an award, which is according to the submission and is unobjectionable upon its face, the award is *primâ facie* binding and conclusive upon the parties. The burden of proof is upon the plaintiff who seeks to avoid it. Upon examining the plaintiff's objections to the award, and the offer of proof made by him in support of his objections, we are unable to see that they disclose any fraud, collusion or other misconduct on the part of the arbitrators, which ought to avoid the award. All the material facts which the plaintiff offered to prove are, that after the hearing, while the arbitrators were in consultation, the chairman expressed in a decided manner his views of the law of the case; that one of the arbitrators stated that he should rely upon the chairman's knowledge of the law; that the other arbitrator dissented from the chairman; that there was a heated and unfriendly discussion between the chairman and dissenting arbitrator, and that afterwards the other two arbitrators refused to discuss the question further with him. It was the right and duty of the chairman to express his opinion of the law, and it was exclusively within the discretion of each associate arbitrator to decide how far he would rely upon that opinion. It was also clearly within the discretion of the majority of the arbitrators to determine how long they would continue the discussion of the case. The further fact alleged, that two of the arbitrators became excited during the discussion, furnishes no reason for setting aside the award deliberately made by the majority. No error is shown in the ruling of the Superior Court refusing to set aside the award and ordering judgment thereon for the defendant.

Exceptions overruled.

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JEREMIAH FOLEY *vs.* STEPHEN C. ROSE.

Suffolk. Nov. 16, 1877. — Jan. 2, 1878. COLT & AMES, JJ., absent.

An assignment, duly recorded, by the holder of a mortgage containing a power of sale, and made to secure two notes for $1000 and $2000, of "the said mortgage deed, the real estate thereby conveyed, so far as the same is security for said note of $1000, thereby secured," transfers the mortgage as security in the first place for the payment of the whole of the note of $1000, although the assignment contains no covenant of warranty.

CONTRACT to recover $511.28. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts in substance as follows:

On November 18, 1873, John Foley mortgaged a parcel of land to Benjamin B. Ware and John Q. A. Clifton, to secure the payment of two promissory notes, one for $1000, payable in three years, and the other for $2000, payable in five years. The mortgage deed contained a power of sale, and provided that "out of the money arising from such sale, the grantees or their representatives shall be entitled to retain all sums then secured by this deed, whether then or thereafter payable," rendering the surplus, if any, to the grantor.

Ware and Clifton afterwards indorsed the note for $1000 to the plaintiff, and at the same time executed to him a deed of assignment, which was duly recorded on January 1, 1874, by which they assigned, transferred and set over to him and his assigns "the said mortgage deed, the real estate thereby conveyed, so far as the same is security for said note of one thousand dollars thereby secured."

On April 26, 1876, Ware and Clifton indorsed to the defend ant the note for $2000, and at the same time executed to him a deed of assignment of "the said mortgage deed, the real estate thereby conveyed, and the note and claim for two thousand dollars thereby secured." The defendant purchased this note and assignment for value, and in good faith.

John Foley made default in the payment of interest due on both notes; and the plaintiff duly advertised the premises for sale by auction, on September 15, 1876, under the power of sale contained in the mortgage, and on that day sold the same to the

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defendant, then still the holder of the $2000 note, as the plaintiff had previously well known, for the sum of $2010, he being the highest bidder therefor, and a memorandum in writing of such purchase and sale was duly signed by the defendant, and the plaintiff executed to the defendant in due form a deed of the premises. The plaintiff also procured a conveyance to the defendant by John Foley, the mortgagor and owner of the equity of redemption at the time of the sale, to perfect the title of the defendant under the deed of the plaintiff, if from any cause defective, and the defendant paid to the plaintiff all that the plaintiff claimed of the net amount of the purchase money, except the sum of $511.28, in dispute.

If, under the assignment to the plaintiff and the above facts, the plaintiff was entitled to have the whole of his note of $1000 and interest first paid in full, out of the mortgage security, or any fund that represents it, before the defendant, as the holder of the $2000 note was entitled to receive anything on account of his note, then judgment was to be rendered for the plaintiff for $511.28; otherwise, judgment was to be rendered for the defendant.

J. A. Maxwell, for the plaintiff.

D. E. Ware, for the defendant.

MORTON, J. By the assignment to the plaintiff, the mortgagees, who at that time were the holders of both notes secured by the mortgage, "assign, transfer and set over unto the said Jeremiah Foley and his heirs and assigns the said mortgage deed, the real estate thereby conveyed, so far as the same is security for said note of one thousand dollars thereby secured."

This transferred the legal title to the mortgage and the land to the plaintiff, leaving in the mortgagees only an equitable interest. The extent of this equitable interest must be determined by the construction of the assignment.

Primâ facie the assignment to the plaintiff to secure him for money advanced operates as security for the whole amount; and there is nothing in this instrument to show that it was intended to have a more restricted operation. The qualifying words, "so far as the same is security for said note of one thousand dollars," cannot have this effect. The same was security for the whole of the thousand dollar note.

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Full effect is given to this provision by holding that it creates a trust in favor of the original mortgagees, which attaches to any surplus that may remain after the note of one thousand dollars is satisfied.

This case cannot be distinguished from *Bryant* v. *Damon*, 6 Gray, 564. There the assignment was precisely in its legal effect, and very nearly in its language, the same as in this case.

The fact that there was in that case a covenant of warranty is not material. Such covenant applies to the premises granted and does not enlarge the grant. The fact that the condition of this mortgage, it containing a power of sale, is unlike that in *Bryant* v. *Damon*, does not affect the principle of that case. The condition affects the mode of foreclosure and the rights between the mortgagor and the mortgagees, but there is nothing in it having any tendency to show that the parties intended that the assignment to the plaintiff should not operate to secure him for the whole of the note held by him in case the property should be insufficient to pay both notes. It is hardly necessary to add that the defendant, so far as this question is concerned, stands in the same position as the original mortgagees. He could take by his subsequent assignment no greater rights than they had.

We are therefore of opinion that the plaintiff is entitled to have his note paid in full out of the proceeds of the mortgaged property, and it is unnecessary to consider whether, if the defendant had a right of contribution, he could avail himself of such right in defence of this action.

Judgment for the plaintiff affirmed.

SAMUEL TOMPSON *vs.* AARON E. FISHER.

Suffolk. Nov. 22, 1877. — Jan. 2, 1878. ENDICOTT & LORD, JJ., absent.

In an action on a promissory note, begun more than six years after the cause of action accrued, the note purported to be signed in the presence of an attesting witness, who testified that he was formerly an office-boy for the plaintiff, and was, at the date of the note, eleven and a half years old; that the name looked like his handwriting; that he thought it was; that he could not tell under what circumstances it was put there; that he had no recollection whatever about it; that if he

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signed it, he must have seen the defendant sign it, or have known that he signed it. *Held*, that the evidence was competent, and sufficient to be submitted to the jury, on the issue whether the note was signed in the presence of an attesting witness.

CONTRACT upon a promissory note, dated July 13, 1868, for $773, on demand, signed by the defendant, and purporting to be attested by Joseph I. Hickey. Writ dated May 6, 1875. Answer: 1. Want of consideration; 2. The statute of limitations. Trial in the Superior Court, before *Putnam*, J., who, by consent of parties and before verdict, reported the case for the determination of this court, in substance as follows:

The plaintiff called Joseph I. Hickey, whose name purported to be upon the note as an attesting witness, who testified that he was formerly an office-boy for the plaintiff, who was an attorney at law; that at the date of the note he was eleven and a half years old; that the name looked like his handwriting; that he thought it was; that he could not tell under what circumstances it was put there; that he had no recollection whatever about it; that, if he signed it, he must have seen the defendant sign it, or have known that he signed it.

The defendant contended that, upon this evidence, the jury could not find that this note was "signed in the presence of an attesting witness," within the Gen. Sts. *c.* 155, § 4.

If the case should have been submitted to the jury, it was to stand for trial; otherwise, judgment for the defendant.

A. B. Wentworth, for the plaintiff.

J. M. Keith & J. W. Keith, for the defendant.

MORTON, J. The burden of proof in this case was upon the plaintiff, to show that the note in dispute was signed in the presence of an attesting witness, but this was a question of fact to be submitted to the jury, if there was any competent evidence tending to prove that fact. *Drury* v. *Vannevar*, 1 Cush. 276.

The note in question is a note which upon its face appears to be attested in due form. The attesting witness testified that he had no recollection of the matter, but that he thought the signature was his, and that, if he signed it, he must have seen the maker sign it, or must have known that he signed it. This is some evidence of the due attestation of the note. It often happens in practice, that an attesting witness to a will, deed, or

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other paper, executed long before he testifies, is unable to recollect the fact or the circumstances of his attestation, and can only swear that, in his judgment, his signature is genuine, and that he saw the maker execute it.

Ordinarily, the jury will derive some aid from the character and appearance of the witness and the parties, and from the circumstances surrounding the case. But it is their province to weigh the evidence and determine whether it satisfies them of the due attestation of the paper. We are of opinion, therefore, that the case at bar should have been submitted to the jury with proper instructions. *Case to stand for trial.*

CENTRAL WHARF AND WET DOCK CORPORATION *vs.* PROPRIETORS OF INDIA WHARF.

Suffolk. Nov. 19, 1877. — Jan. 5, 1878. ENDICOTT & LORD, JJ., absent.

An indenture between A. and B., executed with the declared intention to establish, between the wharves and estates of A. and the estate of B. and any wharf that might be built thereon, an open dock and common passageway for ships, boats and other craft, contained an express grant from A. to B., his heirs and assigns, of the right and use of such an open dock and passageway, and a corresponding grant from B., who claimed some rights in the dock by virtue of his title in an existing wharf of his own, to A.; authorized B., his heirs and assigns, to fill up a small triangle of the flats at the head of the dock as a wharf or road; recited that A. "does hereby remise, release, bargain, sell and convey" to B. a small part of A.'s wharf; "the estate so above conveyed to be subject to all the conditions, agreements and covenants heretofore made;" acknowledged the right of B. to build his wharf in such a way that there would be two projections into the dock, and concluded with a grant and quitclaim to B., his heirs and assigns, of all A.'s right and title in the land which might be covered by the wharf to be built by B. *Held*, that the fee in the soil of the open dock, or of any part of it, did not pass to B.

WRIT OF ENTRY dated September 20, 1875, to recover a parcel of land in Boston, marked A on the plan printed in the margin of the next page. Plea, *nul disseisin*. The case was submitted to this court on agreed facts, the material parts of which were as follows:

In 1814, the tenant was seised in fee of India Wharf, India Street Wharf, (which was wholly built upon land which had been

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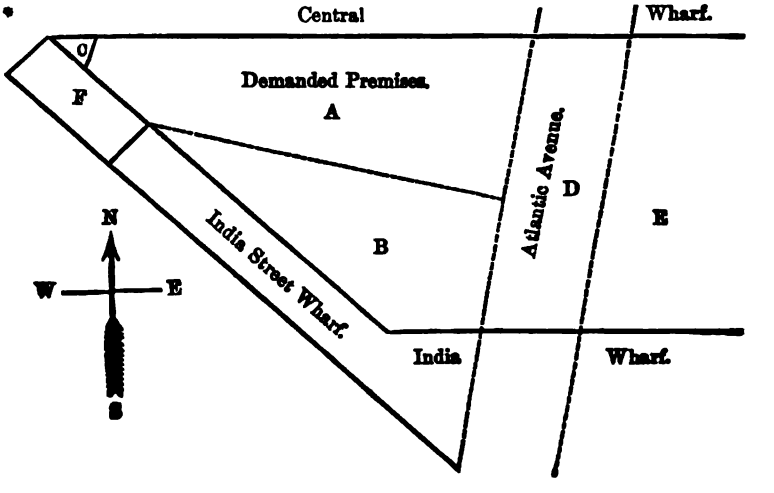
originally flats over which the tide ebbed and flowed,) and of the land, then covered by water and forming an open dock, marked A, B and C, on the plan.*

On December 24, 1814, an indenture was entered into between the tenant, of the one part, and Ebenezer Francis, under whom the demandant claims, of the other part, containing the following: "As it is the intention of the parties to this indenture, for the benefit of their respective estates, to establish between the wharves and estates of the said proprietors of India Wharf and the said estates of the said Francis, and any wharf that may be built thereon, an open dock and common passageway for ships, vessels, boats, &c., and for that and other purposes herein expressed of making the grants, conveyances and contracts hereafter mentioned. Now this indenture witnesseth, that the said proprietors of India Wharf, in consideration of the grants, covenants and agreements of the said Francis hereinafter set forth, and of one dollar paid them by said Francis, the receipt whereof they do hereby acknowledge, do hereby grant and bargain and sell to the said Francis his heirs and assigns forever, the right and use of an open dock and passageway for all ships, vessels, boats and floats of every description, with free ingress and egress for the same at all times, to and from his and their said wharves and estates and every part thereof, in and over the following de-

* 

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scribed pieces of land and flats, that is to say," [describing by metes and bounds as one parcel the entire flats between the wharves of the respective parties, and including what appears on the plan as A, B, C, D and E.] "To have and to hold the said right and use of said dock and the passageway as aforesaid, to him the said Francis his heirs and assigns forever. And the said Ebenezer Francis, in consideration of the premises, and of the conveyance, agreements and permission of the said proprietors of India Wharf hereinafter set forth, and of one dollar by them to him paid, does hereby grant, bargain and sell to the said proprietors, their successors and assigns forever, the right and use of an open dock and passageway for all ships, vessels, boats and floats of every description with free ingress and egress for the same, at all times to and from their wharves and estates and every part thereof in and over the above described common dock land and flats. To have and to hold the said right and use of said dock and the passageway aforesaid to the said proprietors, their successors and assigns forever. And it is mutually understood and agreed that the said dock is forever to remain open and to be a common passageway as aforesaid to the parties, their respective heirs, successors and assigns; and that each party and the heirs, successors and assigns of each respectively, are entitled, have a right to and may receive to their own use forever the dockage which shall accrue from all ships, vessels, boats and floats of every description, lying within that part of said dock which is nearest adjoining and contiguous to their respective estates and wharves now or hereafter to be built, and the said parties do hereby mutually grant the same to each other respectively, to their respective heirs, successors and assigns accordingly forever. It is also understood and agreed that nc fixtures or buildings of any kind (except as hereinafter permitted to said Francis) are to be erected within the bounds above described as said dock, nor any unnecessary obstructions or impediments permitted therein; and it is the understanding of the parties that said Francis, his heirs and assigns, may, and he and they are hereby permitted to fill up, as a wharf or road and for such use and purpose only forever, so much of the northwesterly corner of said dock as is contained in the triangle at said corner," [describing by metes and bounds the parcel marked

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C on the plan.] "And in furtherance of the views and agreements of the parties, and in consideration of the premises, and of the further sum of one dollar paid by said Francis to the said proprietors of India Wharf, the receipt whereof is hereby acknowledged, the said proprietors do hereby remise, release, bargain, sell and convey to said Francis that part of the said India Street Wharf which lies northerly of a line run at right angles across said wharf," [being the lot marked F on the plan.] "The estate so above conveyed to be subject to all the conditions, agreements and covenants heretofore made and which are now enforced with any persons touching any part thereof. Also the said proprietors do hereby acknowledge the right of said Francis (any claim of said proprietors notwithstanding) to erect his wharf projecting at the southeasterly part thereof towards said India Wharf in the form and in the direction represented in the annexed plan,* and do grant and quitclaim to him all their right, title, interest and estate in and to the land which may be covered by the said wharf. To have and to hold the said conveyed and granted premises to him the said Francis his heirs and assigns to his and their use and behoof forever."

In 1868, Atlantic Avenue, as shown on the plan, was laid out as a public highway, by the mayor and aldermen of the city of Boston, under the authority given by the St. of 1867, *c.* 324, and was constructed in the following year in such manner as to exclude the tide water from the dock west of it; and in 1870 and 1871 this portion of the dock (marked A and B on the plan) was filled in with earth by the city of Boston, under authority of the St. of 1869, *c.* 181, to abate a nuisance.

At the date of the indenture, Francis owned the flats on which Central Wharf was afterwards built, and a wharf called the Island Wharf, which was near the place where Atlantic Avenue now crosses the dock, and claimed certain rights in the common dock, outside of where Atlantic Avenue now is, by virtue of his ownership of the latter wharf, but these rights the tenant did not acknowledge. Since the indenture of 1814, the demandant has

* The plan annexed to the indenture showed two projections southward from the eastern end of Central Wharf, which is not included on the plan printed *ante*, 562.

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acquired, by sundry mesne conveyances, all the title, estate, rights and privileges conveyed to Francis by that indenture, and also all such as were referred to therein as belonging to Francis.

Central Wharf was built soon after the indenture of 1814; the parties have since constantly maintained their wharves; and the dock referred to in the indenture of 1814, except the portions thereof occupied by certain extensions of their wharves, mutually agreed to, but which do not cover any portion of the demanded premises, was constantly and uninterruptedly used by both parties from the time of the building of Central Wharf until its use was prevented by the construction of Atlantic Avenue.

During the whole of this period, the demandant has, under the indenture, used the portion of India Street Wharf thereby conveyed to Francis, and that portion of the dock contiguous thereto, as a berth for ships and vessels, calling the same "the short berth," and has always received to its own use the dockage and wharfage accruing from the short berth and this wharf, in the same manner as the other income from its wharf property.

The demanded premises are situated between the original high-water mark and the original low-water mark, and are all within one hundred rods of the original high-water mark. The course and direction of the channel opposite the front of the dock, between the wharves of the respective parties, is parallel to the seaward front of Central Wharf, and nearly at right angles to the course of the dotted line between parcels A and B on the plan.

At the date of the writ, the tenant was in possession of the demanded premises, claiming adversely to the demandant.

If, on the foregoing facts, the demandant was entitled to recover, the case was to stand for hearing to determine the extent of the land for which it should have judgment; if the demandant was entitled to no part of the demanded premises, judgment was to be entered for the tenant.

C. A. Welch & M. Williams, Jr., for the demandant.

G. O. Shattuck & S. S. Shaw, for the tenant, were not called upon.

GRAY, C. J. The only question in this case is whether the fee in the soil of the dock between the two wharves, which is admitted to have been in the tenant before the execution of the

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indenture of 1814 between the tenant and Francis, under whom the demandant claims title, passed thereby to Francis, by virtue of the grant to him in that indenture of a small portion of wharf at the head of the dock.

As a general rule, the grant of a wharf on the sea-shore passes the grantor's title, under the ordinance of 1647, in the flats adjacent towards low-water mark, as appurtenant to, or, more strictly speaking, as parcel of the granted premises. *Doane* v. *Broad Street Association*, 6 Mass. 332. *Ashby* v. *Eastern Railroad*, 5 Met. 368. *Wheeler* v. *Stone*, 1 Cush. 313, 321. *Ammidown* v. *Granite Bank*, 8 Allen, 285, 291, 292. But this, like all other general rules of construction, must yield if a different intention is manifested by the terms of the deed or other instrument of conveyance. *Storer* v. *Freeman*, 6 Mass. 435. *Chapman* v. *Edmands*, 3 Allen, 512. *Wood* v. *Commissioners of Bridges*, 122 Mass. 394. *Hathaway* v. *Wilson*, *ante*, 359.

The principal object of the indenture of 1814 is therein declared to be to establish, between the wharves and estates of the tenant in this action, and the estates of Francis and any wharf that may be built thereon, an open dock and common passageway for ships, boats and other craft. The indenture contains, in the first place, an express grant from the tenant to Francis, his heirs and assigns, of the right and use of such an open dock and passageway, but none of the fee in the soil of the dock. The ensuing grant from Francis to the tenant of a corresponding right to use the common dock is explained by the fact that Francis claimed some rights in the dock by virtue of his title in an existing wharf of his own, and does not imply any grant to him of the fee in the dock. The tenant then expressly authorizes Francis, his heirs and assigns, to fill up a small triangle of the flats at the head of the dock as a wharf or road, and may be held to have thereby granted to him the fee in the flats so filled up, but certainly not in the rest of the flats. *Lufkin* v. *Haskell*, 3 Pick. 356. The tenant also conveys a small part of his adjoining wharf to Francis. The further provision, "the estate so above conveyed to be subject to all the conditions, agreements and covenants heretofore made," would seem to have been inserted to prevent the rights of either party to use the common dock from being in any way affected by these grants of land.

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The indenture concludes with a grant and quitclaim to Francis, his heirs and assigns, of all the tenant's right and title in the land which may be covered by the wharf to be built by Francis, projecting at its seaward end towards the tenant's wharf.

The main purpose of the indenture, and the contrast of the terms used where land is expressly granted with those used in granting the mere right to use the dock, create in our minds an irresistible inference that the indenture was not intended to convey and did not convey to Francis the fee in the soil of the open dock or of any part thereof. *Judgment for the tenant.*

CENTRAL WHARF AND WET DOCK CORPORATION *vs.* PROPRIETORS OF INDIA WHARF.

Suffolk. Nov. 19, 1877. — Jan. 5, 1878. ENDICOTT & LORD, JJ., absent.

A., the owner of a wharf in a city, and of the land under a dock lying between his wharf and wharves of B., granted to B. and his heirs "the right and use of an open dock for all ships, vessels, boats and floats of every description, with free ingress and egress for the same at all times to and from his and their said wharves and estates, and every part thereof in and over" the dock. The deed also contained the following clauses: "The said dock is forever to remain open and to be a common passageway as aforesaid to the parties." "No fixtures or buildings of any kind are to be erected within the bounds above described as said dock, nor any unnecessary obstructions or impediments permitted thereon." Subsequently the parties executed an indenture reciting the above clauses, and providing that they might make certain changes in the boundaries of the dock, all of which were outside of a certain street which the city contemplated building across the dock; and that if the project of the street was abandoned, then A. might make an extension of his wharf inside of the line of the street as shown on a plan annexed; and that neither party abandoned or surrendered any other rights in the dock or wharves "excepting as is herein expressly stated." Shortly after this, the city laid out and constructed the street across the dock and filled up the dock between the street and the shore, under authority of a statute giving the city a lien on the land so filled for the cost of the same. A. thereupon put up buildings on the land so filled. *Held*, in an action of tort against A., for obstructing B.'s right of way, that B.'s easement in the land was limited to an open dock and common passageway for vessels; that the other covenants were incidental to the grant of this easement; and that the easement was extinguished by the act of the city.

TORT for interrupting and obstructing certain easements claimed by the plaintiff in a parcel of land lying westerly of

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Atlantic Avenue, and marked B on the plan printed *ante*, 562. The case was submitted to this court on agreed facts, and was as follows:

On December 24, 1814, the defendant, who then owned the parcel marked B on the plan, of the one part, and Ebenezer Francis, who then owned an adjoining parcel of flats, and whose rights have since been acquired by the plaintiff, of the other part, executed an indenture, which is set forth at length, *ante*, 562, whereby the defendant granted to Francis, "his heirs and assigns forever, the right and use of an open dock and passageway for all ships, vessels, boats and floats of every description, with free ingress and egress for the same at all times, to and from his and their said wharves and estates and every part thereof in and over the following described pieces of land and flats," described by metes and bounds, and including the parcel marked B on the plan. The indenture also contained the following clauses: "And it is mutually understood and agreed that the said dock is forever to remain open and to be a common passageway as aforesaid to the parties, their respective heirs, successors and assigns." "It is also understood and agreed that no fixtures or buildings of any kind (except as hereinafter permitted to said Francis) are to be erected within the bounds above described as said dock, nor any unnecessary obstructions or impediments permitted therein." The defendant also conveyed, by the indenture, to Francis the parcels marked C and F on the plan.

On September 9, 1868, the plaintiff and the defendant executed an indenture which recited that, whereas by the indenture of December 24, 1814, "for the purpose of establishing an open dock and common passageway for ships, vessels, boats, &c., it was agreed that the dock as described therein and on a plan thereunto annexed should forever remain open, and be a common passageway to the parties to the said indenture, their respective heirs, successors and assigns, and that no fixtures or buildings of any kind (except as therein specially mentioned and allowed) should be erected, or any unnecessary obstructions or impediments permitted, within the bounds of said dock, as by said indenture established;" and that whereas certain changes had been made in the boundaries of the dock, and the parties wished for

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their mutual convenience to make other changes; provided that each of the parties might maintain its respective wharves as then built, and might make certain changes according to a plan annexed. That plan showed the location of a "proposed street," where Atlantic Avenue now is, and all the proposed changes were east of this, except the following: "If the project for laying out a new street across said dock, as laid down on the plan annexed, now under consideration by the city of Boston, shall be abandoned, then" the defendant might make a certain extension westerly of this street as shown on that plan. "It being however mutually understood that neither of the parties to these presents does in any manner abandon or surrender any other rights in the docks or wharves held by them by virtue of any deeds, grants or otherwise, excepting as is herein expressly stated."

On December 18, 1868, Atlantic Avenue, as shown on the plan, was laid out as a public highway by the mayor and aldermen of the city of Boston, under the authority given by the St. of 1867, *c.* 324, and was constructed in the following year in such a manner as to exclude the tide-water from the dock west of it; and, in 1870 and 1871, this portion of the dock (marked A and B on the plan) was filled in with earth by the city of Boston, under the St. of 1869, *c.* 181, which authorized the city, in order to abate a nuisance, to fill up the docks inclosed by Atlantic Avenue, and gave the city "a lien on the land made by said filling, for the cost of doing the same."

After such filling, and prior to the date of the writ, the defendant, without the permission of the plaintiff, erected permanent wooden buildings upon that portion of the filled dock marked B on the plan, covering a large part of such parcel, and of such a character as to prevent the plaintiff's passage across in certain directions, and interrupting the use of said parcel by the plaintiff.

If, upon these facts, the plaintiff was entitled to recover, the case was to be sent to an assessor; otherwise, judgment was to be entered for the defendant.

M. Williams, Jr., (*C. A. Welch* with him,) for the plaintiff.

G. O. Shattuck & S. S. Shaw, for the defendant.

GRAY, C. J. The only easement which the plaintiff acquired under the indentures upon which the rights of the parties de-

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pend was of an open dock and common passageway for ships, boats and other waterborne craft. All the covenants, including that against erecting fixtures or buildings of any kind within the bounds of the dock, were incidental to the grant of this easement. The laying out of a street and filling up of the dock by the city, under authority conferred by statute, made the enjoyment of this easement impossible, and thereby extinguished it. *Hancock* v. *Wentworth*, 5 Met. 446. *Canny* v. *Andrews*, *ante*, 155. *Mussey* v. *Union Wharf*, 41 Maine, 34. 3 Toullier Droit Civil (5th ed.) 522. The plaintiff's remedy for the destruction of this easement was by application for damages against the city under the St. of 1867, *c.* 324. *Judgment for the defendant.*

JAMES MCGUINNESS *vs.* JOHN BOYLE & another.

Suffolk. Nov. 15, 1877. — Jan. 30, 1878. COLT & AMES, JJ., absent.

On a petition to enforce a mechanic's lien for labor performed and materials furnished in erecting a building, it appeared that the building was erected in such a manner that, while its foundation was on the land described in the petition, the part above it projected about an inch over the land of an adjoining owner. *Held*, that, no excuse or explanation being shown for so building it, the lien could not be maintained.

PETITION, under the Gen. Sts. *c.* 150, to enforce a mechanic's lien for $178 for labor performed and materials furnished in the construction of a building. Trial in the Superior Court, before *Bacon*, J., without a jury, who allowed the following bill of exceptions:

"There was evidence that the building was erected on an old foundation which was exactly on the line; that, when the building was complete, the upper edge, being the outside edge of the weather or top board, which was nailed on the outside of the thin edge of the clapboard, was one inch over the foundation line, being the boundary line between the respondents and the adjoining owner; that this weather board was seven eighths of an inch thick; and the surveyor testified that there was a gradual slope from the boundary and foundation line to the top of the building. Two other witnesses testified that, judging by the

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appearance of the upper part of the building, it leaned over the foundation line one inch. The division fence between the land described, on which the building stood, and the lot in the rear, was a bank wall of stone, on which a brick wall was built, which was the old foundation wall. The level of the land in the rear of the respondents' land was about four feet below the respondents' land, and was the back yard of the adjoining owner. The building was nine feet wide, by ten feet long and twelve feet high. The respondents introduced evidence tending to show that it would cost very nearly or quite as much to repair the slope over the adjoining land as to tear down the building and rebuild it. The petitioner introduced evidence tending to show that the sloping over could be repaired for $25.

"The judge found as matter of fact that the building projected over the line about an inch on the average, and that the slope was gradual from the division line; and ruled that, by reason of the fact so found and the further fact found that there was no evidence as to how much labor or material was furnished for that part of the building which projected over the line, the lien could not be enforced; and found for the respondents." The petitioner alleged exceptions.

T. E. Barry, for the petitioner.

C. H. Hudson, (*C. Abbott* with him,) for the respondents.

SOULE, J. It being found as a fact by the court below that the building erected by the petitioner projected over the line of the respondents' land and upon land of an adjoining proprietor, although the foundation furnished by the respondents was wholly on their land, and no excuse or explanation being shown by the petitioner for so erecting the structure that the respondents are apparently made continuous trespassers on their neighbor's close, we are of opinion that no lien for the labor and materials furnished in erecting the building can be maintained. The building is not wholly on the land described in the petition, which brings the case within the doctrine stated in *Stevens* v. *Lincoln*, 114 Mass. 476, and in *Foster* v. *Cox*, *ante*, 45.

Exceptions overruled.

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SAMUEL F. PEIRCE *vs.* COHASSET MUTUAL FIRE INSURANCE COMPANY.

Suffolk. Nov. 13, 1877. — Jan. 31, 1878. COLT & AMES, JJ., absent.

A policy of insurance described the building insured as a "frame dwelling-house," and provided that the policy should be void if the assured should appropriate the building to other uses than those mentioned in the policy. In an action on the policy, the answer alleged that the plaintiff used and occupied the building at the time he procured the policy and afterward as a boarding-house and hotel. *Held*, that evidence of such change in occupation subsequent to the date of the policy was not admissible under the answer.

CONTRACT upon a policy of insurance against fire, issued by the defendant to the plaintiff "on his frame dwelling-house." The policy contained the following clause: "When the assured shall alter or enlarge a building, or appropriate it to other purposes than those mentioned in the policy, so as to increase the risk, without first obtaining the consent of the directors, and paying such premium as they may require, the said policy shall thereupon be void." The pleadings appear in the opinion.

At the trial in the Superior Court, before *Gardner*, J., the plaintiff put in evidence the policy of insurance. The defendant, conceding the facts necessary to make a *primâ facie* case, offered to show in defence that the building described in the policy as a "dwelling-house" was, after the date of the policy, occupied as a hotel without the defendant's consent; that the terms "dwelling-house" and "hotel" are well known terms of insurance, and that the risks and premiums on the latter are far greater than on the former. The plaintiff contended that this evidence was not admissible under the answer. The judge so ruled, directed a verdict for the plaintiff, and reported the case for the determination of this court.

If the ruling was correct, judgment was to be entered on the verdict; otherwise, a new trial was to be ordered.

H. D. Hyde, for the defendant.

A. A. Ranney, for the plaintiff.

ENDICOTT, J. The policy insures the frame dwelling-house of the plaintiff, and contains no other description of the building. The declaration states that it was totally destroyed by fire while the policy was in force, and that the plaintiff is entitled to recover the sum named in the policy.

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The answer is not clear and precise in its terms, but it in substance alleges that the plaintiff agreed and warranted in the policy, that the building was and should be occupied as a dwelling-house, and for no other purpose, and that, disregarding the agreements and warranties of the policy, the plaintiff used and occupied the building, at the time he procured the policy and afterward, as a boarding-house and hotel, and the policy was thereby rendered void. No change in the occupation is alleged. The policy contains no express warranty or agreement in relation to the occupation of the building when the policy issued, and whether the defendant has a defence on this ground it is unnecessary to consider, as no evidence was offered in support of it.

The evidence offered was that the building, after the date of the policy, was occupied as a hotel without the consent of the defendant.

The only ground upon which the defendant contends that that evidence was competent, is under the fourth condition of the policy, which provides that "when the insured shall alter or enlarge a building, or appropriate it to other uses than those mentioned in the policy, so as to increase the risk, without first obtaining the consent of the directors, and paying such premium as they may require, the policy shall be void." But evidence of a change in occupation subsequent to the policy is a different defence from that set up in the answer, and, if relied on, should have been pleaded. See *Hawes* v. *Ryder*, 100 Mass. 216. The answer gave no notice that a change in occupation under the fourth condition of the policy would be set up; on the contrary, it implies there had been no change, when it alleges that the occupation at the time the policy issued and after was of such a character as to render the policy void. The evidence was properly excluded.

It is therefore unnecessary to consider the other questions argued at the bar. *Judgment on the verdict.*

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ROBERT B. CAVERLY *vs.* TIMOTHY MCOWEN.

Middlesex. Jan. 9, 10, 1877. — Jan. 3, 1878. COLT, AMES & SOULE, JJ., absent.

In an action on an account annexed for services, if the answer contains a general denial, the defendant may introduce evidence of the plaintiff's negligence and want of skill.

In an action by an attorney at law, on an account annexed for professional services, the judge instructed the jury that the plaintiff was bound to possess and exercise ordinary skill and diligence; that the negligence and want of ordinary skill and knowledge on the part of the plaintiff might be considered in determining the value of his services; that if, by reason of his negligence or want of ordinary care and skill, his services were of no value, they might find for the defendant; and that mere error of judgment upon a doubtful question of the construction of statutes should not be regarded as evidence of a want of competent knowledge or skill, or of negligence, but a disregard of a plain statute provision should be so regarded. *Held*, that the plaintiff had no ground of exception.

In an action by an attorney at law, on an account annexed for professional services, the record of the case in which the plaintiff's services were rendered, and a statute of the Commonwealth, both bearing directly upon the plaintiff's negligence or want of skill in advising and prosecuting the suit, are admissible in evidence against him.

CONTRACT on an account annexed for services rendered and disbursements made by the plaintiff as an attorney at law. The answer contained a general denial of "each and every allegation and particular in the plaintiff's declaration and bill of particulars contained," and alleged that "if the plaintiff shall prove that he performed the services set out in his declaration and bill of particulars, or any part thereof, then the defendant will show that they were unskilfully and negligently performed." Trial in the Superior Court, before *Colburn*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff's services were rendered in the bringing of a petition to the Superior Court in behalf of the defendant in this case, to revise an assessment made by the mayor and aldermen of Lowell on the petitioner's land, of a proportionate part of the expense of the construction of a sewer. That petition, with several others of the same nature, was dismissed because it had not been brought within three months from the time the petitioner received notice of the assessment; and that decision was affirmed on appeal to this court. See *Custy* v. *Lowell*, 117 Mass. 78.

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The plaintiff testified that he exercised his utmost skill and care, both in the interpretation of the statute, under which the defendant's appeal was brought, and in the management and conduct of the defendant's case; and put in the testimony of experts to prove the value of his services. The defendant contended that the plaintiff was not entitled to anything; that although the services were performed and the disbursements made as alleged, yet the plaintiff's conduct in managing the defendant's case was such as to preclude him from recovering; and put in evidence the decision in *Custy* v. *Lowell* and certain papers from the files and the docket entries in the original suit in the Superior Court, and also the St. of 1873, *c.* 261; and contended that the construction put upon this statute by the plaintiff was such an error on his part as to warrant the jury in reducing his claim. The plaintiff objected to the admission of this documentary evidence, but the judge admitted it.

It also appeared in evidence that, after the decision in *Custy* v. *Lowell*, the plaintiff brought a petition and had a hearing before a committee of the city government of Lowell, appointed for that purpose, which resulted in a discontinuance of the sewer assessments which had stood against the defendant, and at the same time, at the expense of the city, a reconveyance was made to the defendant of his estate assessed, which, during the pendency of *Custy* v. *Lowell*, the city had sold in satisfaction of said assessments; which services by the plaintiff constituted a part of his account in this suit. The defendant denied that the results produced were, to any considerable extent, due to the plaintiff's services.

Upon this evidence, the plaintiff requested the judge to give the following instructions to the jury:

"1. The defendant's pleadings on the point of unskilfulness and negligence are insufficient in law, and any testimony on that point, being objected to, ought not to be considered by the jury as having any tendency to diminish the plaintiff's damages.

"2. If the plaintiff, in performing his duties as attorney for the defendant, acted in good faith and in accordance with his own best judgment on the law and facts in the matter, his damages ought not, in law, to be diminished on account of any alleged negligence or unskilfulness.

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"3. No negligence or unskilfulness on the part of the plaintiff can be used to diminish his damages, unless the alleged negligence was so gross that the defendant received no advantage whatever by the services.

"4. For mere error of opinion in the construction of a statute law, honestly acted upon, no diminution in the plaintiff's damages can be legally made."

The judge refused so to rule, but instructed the jury, among other things not excepted to, as follows:

"1. The plaintiff, when he undertook the charge of the defendant's case, was required to possess the legal knowledge, and to exercise the diligence and skill in the conduct of cases, usually possessed and exercised by ordinary lawyers in managing the cases entrusted to them. If the plaintiff possessed such knowledge, and exercised such diligence and skill, he is entitled to recover, although not successful, for his disbursements and reasonable compensation for his services, unless some express agreement was made as to the compensation he was to have, and in that case the express agreement is to govern.

"2. But if in consequence of the want of ordinary professional knowledge, diligence or skill, or through negligence on the part of the plaintiff, the plaintiff's services were of no profit to the defendant, or were a positive damage to him, such want of benefit should be taken into account in determining the value of the plaintiff's services, and the compensation which the plaintiff would otherwise be entitled to recover should be reduced by such damages as the defendant has proved he has sustained in consequence of the negligence or want of ordinary professional knowledge, diligence or skill of the plaintiff.

"3. Mere error of judgment upon a doubtful question of the construction of statutes should not be regarded as evidence of a want of competent knowledge or skill, or of negligence, but a disregard of a plain statute provision should be so regarded."

The judge also instructed the jury that, if they found that the defendant had received no benefit from the plaintiff's services and was actually damaged in consequence of his negligence or want of ordinary care and skill, they might find for the defendant.

The jury returned a verdict for the plaintiff for less than the amount claimed, and he alleged exceptions.

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D. B. Gove, for the plaintiff.

G. Stevens & C. H. Conant, for the defendant.

MORTON, J. The allegation in the defendant's answer that "if the plaintiff shall prove that he performed the services set out in his declaration and bill of particulars, or any part thereof, then the defendant will show that they were unskilfully and negligently performed," is not a direct and positive allegation as required by the rules of pleading, and sets up no defence. *Suit* v. *Woodhall*, 116 Mass. 547. *Jackman* v. *Doland*, 116 Mass. 550.

But this is immaterial, because we are of opinion that it was competent for the defendant, under the general denial of "each and every allegation and particular in the plaintiff's declaration and bill of particulars contained," to introduce evidence of the negligence and want of skill of the plaintiff.

Under the system of pleading established by the Sts. of 1851, *c.* 233, and 1852, *c.* 312, reënacted by the Gen. Sts. *c.* 129, the answer must deny in clear and precise terms every substantive fact intended to be denied, and must set forth in clear and precise terms every substantive fact intended to be relied upon in avoidance of the action. Gen. Sts. *c.* 129, §§ 17, 20.

But it has been held that a general denial of "each and every allegation" of the declaration puts in issue all the facts necessary to be proved by the plaintiff in order to make out a *prima facie* case. In other words, such general denial puts in issue every fact, the burden of proof of which rests on the plaintiff. *Davis* v. *Travis*, 98 Mass. 222, and cases cited.

In the case at bar, the plaintiff declares on an account annexed for services rendered and disbursements made by him as an attorney at law. It is not contended that the services were rendered under a special contract or for a price agreed upon by the parties.

When one person performs labor for another, without any agreement as to price, the law implies a promise by the person at whose request it is performed to pay what it is reasonably worth. This may be sued for upon the common count for work done, or on an account annexed, but such count is substantially the common law count upon a *quantum meruit*, and involves all the allegations contained in that count. The common law count upon a *quantum meruit* alleges not only that the work was

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done at the request of the defendant, but also that in consideration thereof, the defendant promised the plaintiff to pay him therefor so much money as he reasonably deserved to have, which he alleges to be the sum of, &c. Oliver's Prec. 150. 1 Chit. Pl. (16th Am. ed.) 352.

The burden is therefore upon the plaintiff to prove, in order to make a *primâ facie* case, that the work was done at the request of the defendant, and also what it is reasonably worth.

In this case the plaintiff, as he was obliged to do, introduced evidence to show the value of his services, and it was competent for the defendant upon this issue to introduce evidence that, by reason of the negligence or unskilfulness of the plaintiff, such services were of little or no value. This was not matter in avoidance of the plaintiff's action, but met the plaintiff's evidence upon an issue on which the burden was on him, and was admissible under the general denial, which included a denial of all the facts which the plaintiff was bound to prove. See *Howard* v. *Hayward*, 16 Gray, 354; *Mulry* v. *Mohawk Ins. Co.* 5 Gray, 541. The evidence of negligence or want of skill went directly to the question of the consideration of the alleged promise of the defendant which the plaintiff was required to prove.

The instructions to the jury were in substance that the plaintiff was bound to possess and exercise ordinary skill and diligence, and therefore that they might consider the negligence of the plaintiff or the want of ordinary skill and knowledge on his part in determining the value of his services; and that, if in consequence of his negligence or want of ordinary skill they were of no value, they might find for the defendant, and were correct. *Holman* v. *King*, 7 Met. 384. *Varnum* v. *Martin*, 15 Pick. 440.

The only other question is as to the competency of the record of the case of *Custy* v. *Lowell*, and of the St. of 1873, *c.* 261. The services for which the plaintiff sued were rendered in that case and the record was competent to show the character and nature of his services. For the same reason the St. of 1873 was competent. Both bear directly upon the question of the plaintiff's want of skill or negligence in advising and prosecuting the suit, for his services in which the suit at bar is brought.

Exceptions overruled.

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PATRICK H. COONEY *vs.* WILLIAM L. BURT.

Middlesex. January 9. — 10, 1878. AMES & LORD, JJ., absent.

If the time for the filing and presentment of exceptions has been extended, under the Gen. Sts. *c.* 115, § 7, by the presiding judge, to a particular day, and this day is a legal holiday, and the excepting party fails to present them until the next day, the exceptions will be dismissed, if the adverse party takes the objection before the allowance of the exceptions.

MOTION to dismiss the defendant's bill of exceptions to rulings of *Pitman*, J., at a trial in the Superior Court, at March term 1877. The certificate of the judge upon the bill of exceptions was as follows:

"The foregoing bill of exceptions has been examined and found conformable to the truth, and I allow the same, subject to the opinion of the Supreme Judicial Court upon the question of law arising upon these facts: The verdict was rendered April 4, and the time for filing and presentment of these exceptions was extended by the court to April 12. Before the said time expired the exceptions were duly filed with the clerk. The last day of said extended time was the day of the annual Fast. The presentment to the court, that is, to the undersigned, the presiding justice thereof, was not made until the day thereafter, and on this ground the plaintiff objected to the allowance thereof."

H. W. Bragg, for the plaintiff.

C. S. Lincoln, for the defendant.

GRAY, C. J. The question presented does not depend upon the rules which govern the computation of time when the last of a certain number of days allowed by statute or by general rule of court happens to fall on a Sunday or other legal holiday; but upon the construction of the special order made by the judge in this case, which did not define the time by the number of days, but by a particular date, and, as stated in his certificate, was that "the time for filing and presentment of these exceptions was extended by the court to April 12," and clearly did not allow them to be presented to him after that day. The plaintiff, having taken the objection before the allowance of the exceptions, has the right to insist that they were not presented to the judge, as well as filed with the clerk, within the time limited

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by the judge's order. Gen. Sts. *c.* 115, § 7. *Doherty* v. *Lincoln*, 114 Mass. 362. *Commonwealth* v. *Greenlaw*, 119 Mass. 208. *Conway* v. *Callahan*, 121 Mass. 165. *Walker* v. *Moore*, 122 Mass. 501. *Exceptions dismissed.*

FRANCES B. SEARLES *vs.* JONATHAN LADD.

Middlesex. January 10. — 11, 1878. AMES & LORD, JJ., absent.

In an action under the Gen. Sts. *c.* 88, § 59, the declaration alleged that the defendant's dog "attacked and bit the plaintiff, and wounded her in the arm." There was evidence at the trial that the dog was muzzled, and could not, with the muzzle on, have bitten the plaintiff; and that the muzzle had two buckles on it. The plaintiff testified that the dog bit her, and that the buckles did not cause the injury. The jury were instructed that if the dog wounded the plaintiff by biting her, the action could be maintained; but unless it was proved that the dog bit the plaintiff, the action could not be maintained. *Held*, that the plaintiff had no ground of exception to the instructions; and that it was not open to her to contend in this court that the instructions were erroneous, because the jury might have found that the injury was caused by the buckles.

TORT under the Gen. Sts. *c.* 88, § 59. The declaration was as follows: "And the plaintiff says the defendant, on or about November 25, 1876, was the keeper of a certain dog; that on or about the said day the said dog, while in the keeping of the defendant, attacked and bit the plaintiff and wounded her in the arm, whereby the plaintiff was occasioned great pain of body and anguish of mind, and was obliged to expend, and did in fact expend, a large sum of money in endeavoring to heal herself of said wound, and also sustained great damage by injury to her clothing." Trial in the Superior Court, before *Rockwell*, J., who allowed the following bill of exceptions:

"Evidence was introduced tending to show that the defendant's dog bit the plaintiff. The plaintiff testified that she went into a provision dealer's shop and bought some meat, which she carried in a satchel under her left arm; that, as she was going out of the door, the dog, with a strap muzzle on, lay at the door, and she said to him, 'Doggie, ain't you going to let me out?' that, as she passed out by him, the dog did not growl, but rose up on his haunches and seized the wrist of her right hand with

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his mouth, and when she had gone a few rods she noticed blood on her hand, and then, for the first time, knew that she was bitten. It also appeared in evidence that there was but one wound, and that was in the right wrist, going through the skin and into the flesh, and was about one third of an inch long, and there was no other wound or mark upon her wrist. There was evidence that the muzzle which the dog wore had a buckle on the top and another on the side of his head, buckling together the straps, which were otherwise all smooth, and that with the muzzle on he could not have opened his mouth so as to bite the plaintiff, and could not have taken her wrist in his mouth, and could not have bitten her. The plaintiff further testified that she saw her wrist in the dog's mouth; that she did not hit the buckles, and they did not cause the injury, but it was caused by the bite of the dog. There was evidence that the plaintiff, some time after the accident, said that, as she was going out of the door, the dog rose up and stood on his haunches, and, as she felt his cold nose on her wrist, she switched back her dress, which she was holding with her right hand by her side, and went out, and did not know she was hurt till she got some way off. There was no other evidence in the case how the injury was caused, or what caused it.

"The judge instructed the jury that if they should be satisfied, upon the whole evidence, that the defendant's dog wounded the plaintiff by biting her, the plaintiff's action could be maintained, and she could recover damages under her declaration; but, unless it was proved that the dog bit the plaintiff, the action could not be maintained."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

S. B. Wyman, for the plaintiff.

D. S. Richardson, for the defendant.

BY THE COURT. The instruction to the jury was all that the case called for. The plaintiff testified that the dog bit her, and does not appear to have contended at the trial that she was injured in any other manner. *Exceptions overruled.*

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JOHN ROGERS *vs.* WILLIAM H. CROMACK.

Middlesex. January 8. — 14, 1878. AMES & LORD, JJ., absent.

In an action against an officer for the proceeds of a chattel attached and sold by him on mesne process against the plaintiff, the officer is not estopped by his return to deny the plaintiff's property.

CONTRACT for $132, money had and received, with a special count for the same cause of action. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found the following facts:

Edward De Anguera brought an action against John Rogers, the present plaintiff, in the First District Court of Eastern Middlesex, for the price of a piano alleged to have been sold and delivered by De Anguera to Rogers. On that writ, the present defendant, a constable of Malden, as he stated in his return thereon, attached "one piano as the property of the within named John Rogers," and afterwards, pursuant to the provisions of the Gen. Sts. *c.* 123, §§ 73–78, sold it by auction to De Anguera, the highest bidder, for the sum of $135, and delivered the piano to De Anguera, who now has it. The net proceeds, after deducting $32, charges of the sale, were retained by De Anguera to await the result of that action, and never came to the hands of this defendant.

The piano attached was the same for the price of which that action was brought, and was not the property of Rogers, but of De Anguera. At the trial of that action, Rogers denied that he had ever bought the piano or had any title to it, and contended that it was still the property of De Anguera; and on that issue a verdict and judgment were rendered for Rogers. Rogers then, after demanding of this defendant the proceeds of the sale by auction, brought this action.

Upon these facts it was ruled that this action could not be maintained, and judgment was ordered for the defendant; and the plaintiff alleged exceptions.

A. V. Lynde & W. P. Harding, for the plaintiff.

J. H. Benton, Jr., for the defendant, moved for double costs.

BY THE COURT. These exceptions are frivolous. The officer's return in the former action did not estop him to prove, and

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the court below has found the fact to be, that Rogers, the then defendant and now plaintiff, had no property in the piano. *Denny* v. *Willard*, 11 Pick. 519, 526. *Roberts* v. *Wentworth*, 5 Cush. 192. *Exceptions overruled, with double costs.*

MARTIN MULLALY *vs.* GEORGE H. HOLDEN & another.

Middlesex. January 16, 1878. ENDICOTT & SOULE, JJ., absent.

A declaration on an agreement within the statute of frauds need not allege that it was in writing.

A judgment upon default upon two counts alleged in the declaration to be for the same cause of action will not be reversed if either count is sufficient.

WRIT OF ERROR to reverse a judgment rendered by the Superior Court, at March term 1877, affirming a judgment on default of the First District Court of Eastern Middlesex, for $50 and costs, in an action of contract brought by George H. Holden and Warren Holden against Martin Mullaly. Plea, *in nullo est erratum.*

The error assigned was that the declaration alleged no legal cause of action. The declaration, as set forth in the record, was as follows:

"And the plaintiffs say that the defendant passed to them a check, a copy whereof is hereto annexed, and the same was cashed by them; that they duly presented said check for payment, but it was not paid, there being no funds to meet it; whereupon they duly notified the defendant, who refused to repay the amount of the check or any part thereof; wherefore the defendant owes the plaintiffs the said amount and interest thereon.

"And, for the same cause of action, the plaintiffs further say, that the defendant was indebted to the plaintiffs in the sum of $16, and presented to them in payment thereof said check, and the plaintiffs declined to accept the same, whereupon the defendant agreed to guarantee it, the plaintiffs thereupon receipting said indebtedness and paying the defendant the balance of $34; that they duly presented said check for payment, but it was not

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paid, there being no funds to meet it, whereupon they duly notified the defendant, who refused to repay the amount of said check or any part thereof; wherefore he owes the plaintiffs the said amount and interest thereon."

Annexed to the declaration was a copy of the check as follows: "$50. Boston, November 15, 1876. Shoe & Leather National Bank. Pay to the order of M. Mullaly or bearer fifty dollars. Payable November 30, 1876. W. J. Battles & Co."

B. F. Briggs, for the plaintiff in error. The first count is on a check, which the plaintiff in error never signed or indorsed, or became in any way a party to. The second count is on an oral guaranty, which will not support an action, under the statute of frauds.

W. B. Stevens, for the defendants in error, was not called upon.

By the Court. A declaration on an agreement within the statute of frauds need not allege that it was in writing. *Price* v. *Weaver*, 13 Gray, 272. The second count is therefore sufficient, and the judgment affirms the cause of action therein stated, since both counts are alleged to be for the same cause. The case may thus be rightly understood by the court, and the question of the sufficiency of the first count is immaterial. Gen. Sts. *c.* 129, § 34. *Dryden* v. *Dryden*, 9 Pick. 546.

Judgment affirmed.

Leonard M. Parker & others *vs.* Loring Parker & others.

Middlesex. January 16. — 18, 1878. Endicott & Soule, JJ., absent.

A. by his will devised certain real estate to his son B., on the condition that B. should provide for the support of his brother C., "but if said B. shall neglect or refuse to perform and accept" the condition named, then the estate should go to D., upon the same condition, "but not otherwise." C. died in the lifetime of the testator, unmarried and without issue. *Held*, that the condition became impossible by the act of God, and that B. had an absolute estate.

Petition for partition. Loring Parker alone appeared and the other respondents were defaulted. The case was submitted to this court on agreed facts in substance as follows:

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The petitioners and respondents are the heirs at law of David Parker, who died on July 16, 1873, seised in fee of the lands described in the petition, and leaving a will dated April 18, 1863, which was duly admitted to probate, and contained the following clauses:

"Second. I give and bequeath to my son Loring Parker" [certain lands, describing them]. "I also give and bequeath to my son Loring Parker all the personal property of which I may die seised and possessed. All the foregoing bequests to the said Loring Parker are upon the following conditions, viz.: That the said Loring shall exercise a guardianship over my son George Parker and make a prudent and economical provision for his support out of the real estate hereinafter given and bequeathed to said George for his support. I also give and bequeath to said Loring all the remainder of the property or estate hereinafter bequeathed to said George, at his decease, if any there be, said remainder being given said Loring on the conditions before specified. But if said Loring shall neglect or refuse to perform and accept the conditions aforesaid, or either of them, then all the property aforesaid, mentioned as conditional bequests to said Loring, I give and bequeath to my daughter Harriet Tyler, wife of Ansel Tyler, upon the same conditions required of said Loring, to be performed by her and her husband, and, in the event of her husband's death, by her and her heirs; but if said Harriet, or Harriet and Ansel, or either of them, shall refuse or neglect to perform the conditions aforesaid, or any of them, then I give and bequeath the same property to my son L. M. Parker, upon the same conditions as those required of said Loring; and in the event said L. M. Parker shall refuse or neglect to accept and perform said conditions, then I give and bequeath the same property to my daughter Pamelia Hartwell, wife of Jeremiah C. Hartwell, if she and her husband, or his heirs, shall well and truly do and perform all the aforesaid conditions towards said George Parker, but not otherwise."

"Fourth. I give and bequeath to my son George Parker, to be used and expended for his support in an economical manner, during his natural life, a certain piece of land, situated in the northerly part of Lancaster aforesaid, containing about two acres, more or less, described in a deed of Thomas Hazen to me, and

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known as the Pine Hop-pole Lot; I also give and bequeath to the said George a certain other piece of land for the purpose aforesaid, situated in said Shirley, containing by estimation about thirty-five acres, and bounded as follows" [describing it by metes and bounds]. "To have and to hold the same, to be used and expended for the maintenance and support of him, the said George Parker, during his natural life, if the same shall be sufficient; and the remainder I give and bequeath to the person who may become guardian of said George by virtue of the conditions of the bequests first aforesaid, if there shall be any portion thereof remaining which may not be necessary to be expended for his support before the time of his decease."

George Parker, named in the will, was the son of the testator, and was an idiot, incapable of taking care of himself, and died two days before the testator, unmarried and without issue. The testator left no widow.

The lands described in the petition include all the lands, owned by the testator at his death, that are referred to or described in the second clause of the will, and include in their boundaries the lot in Shirley, described in the fourth clause of the will.

The executors have settled their accounts, and have paid all the debts of the testator and funeral expenses out of the personal property which the testator left.

F. A. Worcester, for the petitioners.

D. S. Richardson & G. F. Richardson, for Loring Parker, were not called upon.

GRAY, C. J. All the lands of which partition is sought were devised by David Parker to Loring Parker upon the condition subsequent that he should support George Parker. On the death of George in the lifetime of the testator the performance of the condition became impossible by the act of God, and Loring cannot be said to have neglected or refused to perform it, but holds the lands by an absolute title. 4 Kent Com. 130. *Merrill* v. *Emery*, 10 Pick. 507, 511. ***Petition dismissed.***

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CHARLES COWLEY *vs.* ELIZABETH DOBBINS.

Middlesex. January 17. — 18, 1878. ENDICOTT & SOULE, JJ., absent.

If a controversy is submitted to arbitration, under the Gen. Sts. c. 147, and the award states no question of law for the opinion of the court, and none is required by the terms of the submission to be stated, the decision of the arbitrators is conclusive.

MOTION in the Superior Court to set aside an award made and returned into that court in pursuance of a submission before a justice of the peace under the Gen. Sts. *c.* 147, §§ 1, 2, on the ground that the arbitrators had made certain mistakes of law.

The submission followed the form given in the statute, and the award, signed by the arbitrators, was as follows: "The subscribers, appointed arbitrators by the annexed agreement of submission between Charles Cowley of Lowell and Elizabeth Dobbins, having heard the parties and their witnesses fully, both parties being present, do award and determine that said Elizabeth Dobbins is indebted to Charles Cowley in the sum of one hundred and fifty-six dollars and seven cents ($156.07), and that said Charles Cowley owes said Elizabeth Dobbins nothing, and except as afoersaid neither party has any claim upon the other. And the arbitrators award that two hundred dollars shall be paid them for their services, one half of said amount to be paid by Charles Cowley, and one half by Elizabeth Dobbins."

Brigham, C. J., overruled the motion, and ordered judgment upon the award. The plaintiff alleged exceptions.

C. Cowley, pro se.

D. S. Richardson & G. F. Richardson, for the defendant, were not called upon.

BY THE COURT. The plaintiff's motion shows no grounds for setting aside the award. No question of law having been stated by the arbitrators for the opinion of the court, nor required by the submission to be so stated, the determination of the arbitrators was conclusive upon all matters of law as well as of fact. *Ellicott* v. *Coffin*, 106 Mass. 365. *Gardner* v. *Boston*, 120 Mass. 266.

Exceptions overruled.

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JOHN B. FAULKNER *vs.* GEORGE I. BAILEY & another

Middlesex. January 18. — 21, 1878. COLT & ENDICOTT, JJ., absent.

Under the Gen. Sts. *c.* 155, § 14, a payment of interest on a promissory note by the principal does not take the debt out of the statute of limitations as against a surety.

CONTRACT upon a promissory note, dated July 10, 1869, for $500, payable to the plaintiff, or order, on demand, with interest semiannually, signed by Samuel Shute as principal and by the defendants as sureties. Writ dated January 15, 1877. Answer, the statute of limitations.

At the trial in the Superior Court, before *Wilkinson*, J., the note was produced in evidence and the signatures of the defendants admitted. The plaintiff, to take the note out of the statute of limitations, relied upon payments of interest, regularly made every six months from the date of the note to January 10, 1876, and indorsed on the back of the note. These payments were made by Shute, and indorsed by him on the note. The defendants made no payments on the note, nor had they any knowledge of the payments by Shute, nor of the indorsements on the note.

The judge directed the jury to return a verdict for the defendants, and reported the case for the determination of this court.

J. W. Pettengill, for the plaintiff.

O. S. Knapp & C. D. Adams, for the defendants.

GRAY, C. J. It was formerly held in this Commonwealth, that an acknowledgment or promise, or a part payment, by one of two joint debtors, took the debt out of the statute of limitations as against both. *Frye* v. *Barker*, 4 Pick. 382. *Sigourney* v. *Drury*, 14 Pick. 387, 391. But the rule has been wholly changed by statute.

By the St. of 1834, *c.* 182, (which followed the St. of 9 G. IV. *c.* 14, commonly known as Lord Tenterden's Act,) it was enacted, that no acknowledgment or promise by words only should be deemed sufficient to take any case out of the operation of the statute of limitations, or to deprive any party of the benefit thereof, unless in writing and signed by the party chargeable thereby; and that when there should be two or more joint con-

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tractors, no one of them should lose the benefit of the statute so as to be chargeable by reason only of a written acknowledgment or promise made and signed by any other or others of them; "provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest, made by any person whomsoever." Under that statute, although an acknowledgment by one joint contractor would have bound him only, a part payment by one might still have bound both.

The provisions of that statute were substantially reënacted in the Rev. Sts. *c.* 120, §§ 13–17, in the last of which sections it was provided that "nothing contained in the four preceding sections shall alter, take away or lessen the effect of a payment of any principal or interest, made by any person." But by § 18, it was further provided that, in case of two or more joint contractors, "no one of them shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any payment, made by any other or others of them." The effect of a part payment, as of an acknowledgment, was thus limited to him who made it. *Peirce* v. *Tobey*, 5 Met. 168. *Balcom* v. *Richards*, 6 Cush. 360.

All these provisions of the Revised Statutes are reënacted in the Gen. Sts. *c.* 155, §§ 13–17, without change, except in incorporating the provision of § 18, as to the effect of a payment by a joint contractor, into § 14, which limits the effect of an acknowledgment or promise by a joint contractor. This transposition cannot be construed to enlarge the operation of the provision of the Gen. Sts. *c.* 155, § 17, (which reënacts in very words the provision of the Rev. Sts. *c.* 120, § 17, above quoted,) without altering the effect of a payment at the time of the passage of the General Statutes, and wholly defeating the provision of § 18 of the Rev. Sts. retained in § 14 of the Gen. Sts.

The cases cited for the plaintiff contain nothing inconsistent with this view. In *Ramsay* v. *Warner*, 97 Mass. 8, 13, the question was of the debt to which the payment was to be applied, not of the party to be bound; in *Sigourney* v. *Wetherell*, 6 Met. 553, the payment was made by the person sought to be charged; and in *Sage* v. *Ensign*, 2 Allen, 245, it was made by one of two partners, who, by the very relation between them,

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was authorized to bind his copartner. But under the General Statutes, as under the Revised Statutes, a part payment by a principal debtor does not take the debt out of the statute of limitations as against a surety. *Judgment on the verdict.*

EDWARD A. DAVIS & others *vs.* EDNA J. DAVIS, executrix.

Middlesex. Jan. 10. — 11, 1878. AMES & LORD, JJ., absent.
Jan. 21. — 22, 1878. ENDICOTT & LORD, JJ., absent.

An order of a justice of this court, on a probate appeal, declining to submit particular issues of fact to a jury, cannot be revised by bill of exceptions, but only by appeal.

The burden of proving that the execution of a will, offered for probate, was procured by fraud or undue influence is upon the party alleging it.

On the trial of the issue of fraud or undue influence in procuring the execution of a will, no exception lies to the exclusion of evidence of the testator's statements and declarations, subsequent to the execution of the will, as to its contents, not appearing to have been made so soon thereafter or so connected with evidence of his previous state of mind as to have any legitimate bearing upon the issue.

On the trial of issues of a testator's sanity and of fraud or undue influence, on an appeal from the allowance of a will by which the testator authorized his wife, who was executrix, if the income of the estate was insufficient, to use so much of the principal as might be necessary for her support, the presiding judge gave instructions to the jury upon both issues, which were not objected to, and, refusing to give in terms certain specific requests for instructions by the appellants, also instructed the jury that if they were satisfied that testator executed the will and that he was of sound mind, and that the will was read to him twice, and that he suggested an alteration in it which was made, it was to be presumed that he knew what it contained, and that it was not for them to inquire into the meaning attached by him to its provisions unless he was deceived as to its contents; that if the attorney who drew the will had answered falsely when inquired of as to the meaning of particular clauses, or had made different provisions from what he was instructed to make, falsely representing them as having the effect intended by the testator, it would be a fraud on the testator; and that the clause as to the use of the principal authorized the wife to use it if necessary, either at her own discretion or under direction of the court, and if the testator instructed the attorney that he wished her to have authority to so use the principal, and, on hearing the clause read, did not inquire as to whether there would be any control over her in exercising the right to use it, the silence of the attorney was not evidence of fraud, and it was immaterial whether the clause gave the wife an absolute discretion in the matter or not. *Held*, that the instructions were sufficiently favorable to the party contesting the validity of the will.

PETITION to establish the truth of exceptions disallowed at the hearing and trial of an appeal from a decree of the Probate

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Court, admitting an instrument to probate as the will of Thomas Davis, by which he appointed his wife, Edna J. Davis, executrix; directed his executrix to furnish his son Franklin M. Davis a suitable support out of the estate until he became of age; devised and bequeathed all the residue of his estate to his wife, so long as she should remain unmarried and his widow, with remainder, on her decease or marriage, to his four sons, to be divided among them and the issue of any deceased son by right of representation; directed that the share of his youngest son, Franklin M., in his estate, together with the estate transmitted to him by his mother, should not exceed the share of his other sons in his estate; and authorized his wife, so long as she should remain unmarried and his widow, to sell at public or private sale any part or all of his real estate, when it could be done to advantage, and to execute proper conveyances of the same, the proceeds to be deposited in a savings bank, or, with any personal property left by the testator, to be invested in certain securities, and his wife, if the income of the estate was insufficient, to use so much of the principal as might be necessary for her support.

The reasons of appeal were as follows: 1st. "Because the said instrument was illegally made and executed. 2d. Because the said Thomas Davis, at the time when he executed said instrument, was not in a sound and disposing state of mind. 3d. Because said Thomas Davis was induced to execute said instrument by misrepresentation, deception and fraud. 4th. Because said Thomas Davis was induced to execute said instrument by undue influence."

The present petition alleged that upon an application to frame issues to a jury, *Soule*, J., ordered that the only questions submitted to them should be, 1st, whether the deceased, at the time of executing the instrument, was of sound mind; 2d, whether the execution of the instrument was procured by the fraud and undue influence of the executrix, and of others acting in her behalf; and refused the request of the appellants that the following additional questions should be submitted to the jury: 3d, whether the instrument was the will of the deceased, executed by him with knowledge of its contents; 4th, whether the deceased, at the date of the instrument, wished or intended to give his wife the right, in her own discretion, to dispose of his

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whole estate, or of any part of the principal thereof; and that to this order and refusal the appellants alleged exceptions.

The petition further alleged, in substance, that a trial by jury was had upon issues framed according to the order aforesaid, and a verdict returned thereon in favor of the executrix; that at such trial other exceptions were taken, and, together with the exception before mentioned, were reduced to writing, filed, notified to the adverse party, and presented to the judge, within three days after the verdict; that the judge, after hearing the counsel of the parties, prepared a new draft of the bill of exceptions, stating the same questions and in the same aspect as in the bill of exceptions presented to him by the appellants, except in omitting their exception to the order and ruling upon the issues to be submitted to the jury; and that the judge made a certificate under his hand, disallowing the bill of exceptions presented as incorrect, because no exception had been taken to his refusal to submit the additional issues to the jury, but expressing his readiness, if the appellants would strike out the alleged exception to such refusal, to allow a bill of exceptions substantially as drawn by him as a substitute for the bill presented.

The petition prayed that the truth of all the exceptions might be established; and the petitioner moved that it might be referred to a commissioner to report the facts to the court.

By direction of the court, the argument was confined, in the first instance, to the questions, whether the refusal to submit the additional issues to the jury was the subject of exception; whether these issues were included in the reasons of appeal; and whether, if the exception to such refusal was rightly disallowed, the petitioners were entitled to be heard upon the exceptions taken at the trial.

C. H. Hudson, (*C. Abbott* with him,) for the petitioners.

T. H. Sweetser, (*G. A. A. Pevey* with him,) *contra*.

GRAY, C. J. It was said by this court, in a case which involved a large amount of property, and which was fully and ably argued and carefully considered upon a report of the justice before whom the issues were framed and the trial had, that when a testamentary instrument offered for probate is executed and attested as required by statute, and has not been revoked or cancelled, only three questions can arise: 1st. Was the testator

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at the time of executing the instrument, of sound and disposing mind and memory? 2d. Was the instrument executed by him under fraud or undue influence? 3d. Did he execute the instrument *animo testandi*? *Barker* v. *Comins*, 110 Mass. 477, 487.

In the present case, the first and second of these questions were submitted to the jury; and it may well be doubted whether the third question was included in the reasons of appeal, or was fairly presented by the additional issues tendered and disallowed. But we have no occasion to consider this, because the refusal to submit these issues to the jury is not the subject of exception.

By the Constitution and laws of the Commonwealth, trial by jury in probate appeals is not a matter of right, but rests in the usages and discretion of the court. The fifteenth article of the Declaration of Rights, which secures trial by jury, expressly excepts "cases in which it has heretofore been otherways used and practised;" and before the adoption of the Constitution, and for some time after, all appeals from judges of probate were heard and determined by the Governor and Council, without a jury. Province Charter, 1 Prov. Laws, (State ed.) 15. Const. Mass. *c.* 3, § 5. St. 1783, *c.* 46. *Peters* v. *Peters*, 8 Cush. 529, 541. The statute which first made this court the Supreme Court of Probate contained a provision, which has been continued in force by successive reënactments, that when it appears, from the reasons of appeal, that the sanity of the testator, or the attestation of the witnesses in his presence, is in controversy, the court "may, for the determination thereof, direct a real or feigned issue to be tried before a jury." Sts. 1783, *c.* 46, § 4; 1817, *c.* 190, § 7. Rev. Sts. *c.* 62, § 16. Gen. Sts. *c.* 92, § 20. And in 1836 this provision was extended by enacting that "if, upon the hearing of an appeal in the Supreme Court of Probate, any question of fact shall occur, that is proper for a trial by jury, the court may cause it to be so tried, upon an issue to be formed for the purpose under the direction of the court." Rev. Sts. *c.* 83, § 46, and Commissioners' Report, § 44 and note. Gen. Sts. *c.* 117, § 18.

It has been the practice of the court, upon the request of either party to a probate appeal, to submit to a jury the question of the

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execution or attestation of an instrument offered for probate as a will, or of the sanity of the testator, or of undue influence; and other issues of fact have been sometimes ordered to be so tried. An order granting or refusing such a trial is not a ruling upon a matter of law, but depends upon the discretion of the judge in each case. Exceptions lie to rulings in matter of law only; and the proper mode of revising an order of a justice of this court, which involves matter of fact or of discretion, in a cause of equity or of probate jurisdiction, is by appeal. Gen. Sts. *c.* 115, § 7; *c.* 113, §§ 8–11; *c.* 117, § 14. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 102 Mass. 45. *Brooks* v. *Tarbell*, 103 Mass. 496. *Ross* v. *New England Ins. Co.* 120 Mass. 113. *Newell* v. *Homer*, 120 Mass. 277, 281.

As the appellants had no right of exception to the order regulating the issues to the jury, the presiding judge might properly disallow a bill of exceptions which contained an exception to that order; and, so far as concerns that exception, the present petition cannot be maintained. But the disallowance of that exception does not defeat the right of the petitioners to establish the truth of the exceptions taken at the subsequent trial. *Sawyer* v. *Yale Iron Works*, 116 Mass. 424, 433, and cases cited. The petitioners' counsel having expressed his readiness to waive the first exception, if the court should be of opinion that it could not be allowed, and both counsel having agreed that the other exceptions are truly stated in the draft of the presiding justice, there is no question of fact that requires a reference to a commissioner, and the exceptions taken at the trial may be argued upon that draft. *Further argument accordingly.*

The judge's draft of the bill of exceptions was in substance as follows:

At the trial of the two issues framed by order of this court, the three attesting witnesses were produced, and testified that the testator was of sound mind when he executed the will, and that he signed it in their presence, and that they witnessed it as his will at his request. No question was made as to the due formality of the execution.

The attesting witnesses were the attending physician, the attorney at law who drew the will, and a neighbor of the tes-

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tator. It appeared that the physician, having been told by the testator that he wished to make his will and wanted a Boston lawyer, recommended the attorney, who was employed, as being capable and likely to charge a smaller fee than a Boston lawyer would charge; and, at the request of the testator, asked the attorney to go to the testator's house. The attorney, who had never known the testator before, nor the executrix, went as requested, was asked by the testator what his charge for the service would be, and, his reply being satisfactory, was instructed as to the wishes of the testator.

The attorney testified that the testator spoke of one Pfaff, who left his property to his wife as long as she was a widow; that he called in his wife, and said he wanted her to hear what he was going to do; that she said she did not want to know what he proposed to do with his property, and went out of the room; that the testator continued, saying that he wanted the property so left that after his wife had done with it the four children would share equally, including what would come to the youngest child from his mother, to whom he had already given some property; that the witness spoke about authority to the executrix to sell real estate, and the testator said he wanted her to have authority to sell, if she could do it to advantage, but did not want the property sacrificed; spoke of the way of investing the proceeds, and said, in answer to the inquiry of the attorney whether he wished her to have the right to use the principal, that he did wish her to, if needed, and, on being asked if he wished her to be exempt from giving bonds, answered, "No, she would better give sureties in the ordinary way." The attorney took minutes of the instructions, went home and drew the will, leaving a blank to be filled relative to the personal property. A few days after, he went to the testator's house and read the will to him, and made an interlineation in the will at the testator's direction, who then asked him to read it again, which the attorney did; the testator thought it over a few minutes and said it was satisfactory, and it was executed. The testator told the attorney that the estate consisted of houses in Boston and Somerville and Everett, and a mortgage which had been reduced to four thousand dollars, and twelve hundred dollars in a bank, and that there was a house in Charlestown which he had caused to be conveyed to

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his wife. There was no conflict of testimony as to what occurred between the testator and the attorney, nor as to what took place when the will was executed.

It was in evidence that the testator was in feeble health when the will was signed, and had been for a long time in the daily use of morphine under a physician's direction, and that the executrix was his second wife, and mother of his youngest son, he having three sons by a former wife, who were all of full age, and had supported themselves for many years. These three sons are the contestants and appellants. The will was not read in the presence of the witnesses.

There was conflicting testimony as to the physical and mental condition of the testator about the time the will was signed.

Subsequent statements made by the testator as to the contents of his will were offered by the contestants, as throwing light on his mental condition when the will was signed, and were admitted.

It was in evidence that the contestants seldom visited their father until after they learned that he had made his will; then their visits were more frequent. And they introduced evidence tending to show that either the executrix or the nurse was generally in the room when they saw him, and that they saw him alone only in one or two instances; but there was no evidence of any request on their part to see him alone except once when the testator, after an interview with one of the contestants, requested the executrix, on her entering his room, to remain there.

It was in evidence that no explanation of the meaning of any clause in the will was made to the testator; and that he was physically weak, and had formerly been intemperate in the use of spirituous liquors, and that the executrix was a robust woman. There was no evidence of any specific attempt to influence the testator in relation to his will, nor to mislead him as to the contents of the will when drawn up; though there was evidence which the contestants contended tended to show that the wife exercised control over the husband.

The counsel for the appellants asked the court to instruct the jury as follows: "1. If, owing to the feebleness of body and mind of the testator, the discretionary power of the wife to sell, and its effect on the character of the instrument was not likely

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to be observed by him on a single reading to him, it was a fraud. 2. If this instrument was signed by the testator in ignorance of its contents or true character, and was contrary to his intentions, it was a fraud, and the presumption is that it was obtained by undue influence and fraud. 3. The power to spend a part of the principal, as the clause stands in the instrument, is a purely discretionary power. 4. The burden of proof was on the executrix."

The judge declined to give any of these instructions in terms; but submitted the case to the jury under instructions as to soundness of mind and as to what constitutes undue influence, which were not objected to; and instructed them that the burden was on the executrix to prove the execution of the will and that the testator was of sound mind when he signed it; and that the burden was on the appellants to prove that the will was procured by fraud or undue influence; that if they were satisfied that the testator executed the will and that he was of sound mind, and that the will was read to him twice, and that he suggested an alteration in it which was made, it was to be presumed that he knew what it contained, and that it was not for them to inquire into the meaning which he attached to particular clauses or provisions in it, unless they should be of opinion that he had been misled or deceived by the person who read the will to him as to what it contained; that if the attorney was inquired of as to the meaning of particular clauses and had given a false answer, or had been instructed to make particular provisions in the will and had made provisions of a different character, and had falsely represented that such provisions had the effect which the testator intended, that would be fraud on the testator. That the clause giving the wife authority to use the principal of the estate, if necessary, authorized her to use it, if necessary, either at her own discretion or under direction of the court, and if the testator instructed the attorney that he wished her to have authority to use the principal, if necessary, and on hearing the clause read made no inquiries as to whether there would be any control over her in exercising the right to use it, the silence of the attorney was not evidence of fraud, and it was wholly immaterial to the case whether the clause gave the wife an absolute discretion in the matter or not.

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The jury were further instructed that the evidence of statements and declarations of the testator, made after the will was signed, were to be considered by them only on the question of his mental capacity to make a will, and not upon the question whether the will was made in accordance with his instructions or wishes at the time of its execution.

The verdict was in favor of the executrix upon both issues; and the appellants alleged exceptions.

C. H. Hudson, (*C. Abbott* with him,) for the appellants.

G. A. A. Pevey, for the appellee, was not called upon.

By the Court. The ruling as to the burden of proof was correct. *Baldwin* v. *Parker*, 99 Mass. 79. The subsequent statements and declarations of the testator appear to have been offered in evidence upon the issue of sanity only, and do not appear to have been made so soon after the execution of the will, or to have been so connected with evidence of his previous state of mind, that they could have any legitimate bearing upon the issue of undue influence. *Shailer* v. *Bumstead*, 99 Mass. 112. The only issues on trial were of sanity and undue influence. The bill of exceptions shows that instructions were given to the jury upon both these issues, which were not objected to and are not reported. The instructions given upon the subjects of the special requests of the appellants were sufficiently favorable to them, and were all that the case required.

Exceptions overruled.

George Taft *vs.* Edwin A. Larkin.

Middlesex. January 9. — 31, 1878. Ames & Lord, JJ., absent.

Under the Gen. Sts. c. 130, § 3, a demand for money paid cannot be set off, unless it is for a sum that is liquidated, or one that may be ascertained by calculation.

Contract. The defendant filed a declaration in set-off on an account annexed, one item of which was $1000 money paid. The defendant died pending the action, and his administrator appeared. The case was tried in the Superior Court, without a jury before *Rockwell*, J., who ruled that the set-off could not be

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maintained, and found for the plaintiff. The defendant alleged exceptions, the substance of which appears in the opinion.

L. Wallace & W. H. Atwood, for the defendant.

F. A. Worcester, for the plaintiff.

ENDICOTT, J. The only question raised relates to an item of $1000 in the defendant's declaration in set-off, which he contends he is entitled to recover as money paid by his intestate Larkin to the plaintiff. The presiding judge ruled that the defendant could not recover this item, and we must decide, upon the facts found by him at the trial, whether the ruling was correct.

It appears that in December, 1870, the plaintiff, at the request of Larkin, purchased a farm in New Hampshire, and it was agreed between them that Larkin should furnish all the money for the purchase, which was $3400, and that both should be interested in cutting off the wood and lumber. The deed was executed to the plaintiff. Larkin gave to the plaintiff the check for $1000 which is the subject of this controversy, and agreed to pay him the balance of $2400. He did not pay this, but it was raised on the notes of the plaintiff indorsed by Larkin, which were renewed several times. In the year 1871, Larkin exercised acts of ownership over the farm and collected the rents and profits. Before the agreement in relation to cutting off the timber was carried out, Larkin became insane and was taken to an asylum, where he remained unable to transact any business from January, 1872, until his death in 1874.

Owing to the condition of Larkin, the plaintiff was obliged to take up the outstanding notes upon which Larkin was indorser and which he had agreed to pay, and did so by executing a mortgage on the farm for $2500. The rents and profits received from the farm by the plaintiff were not more than sufficient to pay the taxes and other incidental expenses. After repeated attempts to sell the place, the plaintiff was compelled to exchange the equity of redemption for other property which has never yielded him any valuable consideration. The plaintiff testified, and we must presume that the judge found, that whatever he did in relation to the purchase of the property he did at the request and for the benefit of Larkin, and as his agent. The plaintiff did not request of Larkin's guardian, after he became

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insane, payment of the $2400, or the fulfilment of the oral agreement concerning the farm. The guardian did not know or consent to the mortgage and sale, and has never offered to pay the $2400 or to save the plaintiff harmless from the obligations he has assumed. But it did not appear whether Larkin's guardian did or did not know of the transaction about the farm.

The terms of the oral agreement, especially that part of it relating to the cutting off the timber, are not fully disclosed, and it is difficult to determine the respective rights of the parties arising out of the conduct of the business, but sufficient appears to show that the sum due to the plaintiff, if any is due, cannot be determined in this manner.

A demand for money paid cannot be set off unless for a sum liquidated, or one that can be ascertained by calculation. Gen. Sts. *c.* 130, §§ 3, 16. The defendant contends that, the plaintiff having mortgaged the farm and sold the equity without consent of Larkin or his guardian, the performance of the agreement relating to cutting the timber became impossible, and there was a complete failure of consideration for the $1000 advanced. See *Dix* v. *Marcy*, 116 Mass. 416.

But we cannot say there was a complete failure of consideration, for it appears that Larkin took the rents and profits in 1871, the amount of which is not ascertained. And assuming, though we do not decide, that the defendant might show a breach of the agreement by the plaintiff, and be entitled therefore to recover the $1000 advanced by way of set-off, from which no rents and profits could properly be deducted, yet it appears that Larkin, while capable of transacting business, and his guardian, after he was insane, failed to perform his part of the agreement, and pay the balance of $2400, or hold the plaintiff harmless on the notes. How far this is capable of explanation on the facts found or upon a more full disclosure of the terms of the agreement, and how far the plaintiff, to whom no fraud is imputed, was justified in his subsequent conduct, are questions to be determined, before the plaintiff can be held liable for a breach of his contract to such extent that the defendant can recover the $1000 advanced.

Several other difficulties and questions proper to be passed upon might be suggested, but enough has been said to show that

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the sum which the defendant would be entitled to recover arising out of this transaction must depend not only on the determination of the amount received by Larkin as rents and profits of the farm in 1871, but also upon a full examination of the agreement entered into, and of the conduct of the parties during the whole period. It is evident therefore that, if the defendant is entitled to recover anything, the amount is not a liquidated sum or capable of being ascertained by calculation, and cannot be allowed in set-off.

What remedy the defendant may have, it is not for us to indicate; we decide only that it cannot be had in this form of proceeding. *Exceptions overruled.*

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ACTION.

1. On a promise made to the vendor by the purchaser of an equity of redemption, to assume and pay, as part of the consideration named in the deed, the mortgage on the land, no action lies by the mortgagee. *Prentice* v. *Brimhall*, 291.
2. A person, who is constructing a brick wall abutting upon a highway, may be liable for negligence in not providing safeguards or barriers to prevent the accident of a brick falling, to the injury of a passing traveller, although there is no negligence of his servants, who are breaking and handling the bricks. *Jager* v. *Adams*, 26.
3. In an action for personal injuries caused by the falling of the defendant's wall, there was evidence that the defendant's building and a building upon the adjoining estate, the side walls of which were very near but distinct from each other, were destroyed by fire; that the two side walls remained standing to a level with the street, with rubbish piled against and to the top

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of each; that about six months afterwards, as the plaintiff with others had nearly removed the wall upon the adjoining estate, the defendant's wall fell, causing the injuries. There was no evidence that the defendant's wall was dangerous or could have fallen while both buildings stood, or while both walls remained in the condition in which they were left by the fire, or that the defendant had notice, or was bound to know, that the wall on the adjoining estate had been or was about to be removed. *Held*, that the action could not be maintained. *Mahoney* v. *Libbey*, 20.

4. A mill-owner, who partially obstructs the flow of water in a stream from his own mill, is not thereby prevented from maintaining an action against another mill-owner, lower down the same stream, for the injury caused by an additional obstruction in consequence of the latter maintaining his dam at too great a height, whereby the water is set back; and the doctrine of contributory negligence does not apply. *Brown* v. *Dean*, 254.
5. Under the Gen. Sts. *c.* 127, § 1, an action of tort against a mill-owner, who obstructs the flow of water in a stream by maintaining his dam at too great a height, to the injury of another mill-owner, survives. *Ib.*

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APPEAL.

1. In a probate appeal, the decision of a single judge on questions of fact will not be reversed, unless it is clearly shown to be erroneous. *Slack* v. *Slack*, 443.

2. At the hearing on an appeal by an administratrix from a decree making an allowance to the widow of an intestate, evidence that the assets in the hands of the appellant are insufficient to pay the allowance made to the appellee by the Probate Court is inadmissible, if the fact of such insufficiency is not stated as one of the reasons of the appeal. *Ib.*

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ARBITRAMENT AND AWARD.

1. If a controversy is submitted to arbitration, under the Gen. Sts. *c.* 147, and the award states no question of law for the opinion of the court, and none is required by the terms of the submission to be stated, the decision of the arbitrators is conclusive. *Cowley* v. *Dobbins*, 587.

2. On the issue whether a corporation, which had received a sum of money on certain conditions, was induced, on an alleged failure to perform the conditions, to enter into an agreement of submission to arbitration by the concealment of material facts, evidence that authority was given by the other party to its treasurer to appropriate a part of the money for another purpose; that the corporation itself at the hearing before the arbitrators proved such appropriation by its treasurer; and that the arbitrators allowed the sum so appropriated in reduction of the sum received by the corporation, is insufficient, and is no evidence of a waiver of the conditions upon which the corporation held the balance of the money. *Morville* v. *American Tract Society*, 129.

3. Objections that an award exceeds the submission, and that the claim submitted has been materially altered in its terms, are not sustained by evidence, the only effect of which is to reduce the claim and not to change its character. *Ib.*

4. At a hearing upon a motion to accept an award of three arbitrators in favor of A. against a corporation, it was objected that one of the arbitrators was improperly influenced by A., and the judge, before whom A. and the arbitrator appeared as witnesses, found as facts that they were familiarly acquainted; that, before the submission to arbitration, A. had honestly stated the principal facts in the case to him; and that upon these facts the arbitrator had expressed the opinion that no commercial house could stand upon the transaction; and ordered judgment on the award. *Held*, that no error in law appeared. *Ib.*

5. It is no ground for setting aside an award of an arbitrator, that he had formerly been counsel, in another action, for the party in whose favor he found, although this fact was not known or communicated to the party against

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whom the award was made, or to his counsel, in the absence of evidence that the fact was intentionally concealed. *Goodrich* v. *Hulbert*, 190.

6. It is no ground for setting aside an award of a majority of arbitrators, which is according to the submission, and unobjectionable upon its face, that, after the hearing, while the arbitrators were in consultation, the chairman expressed in a decided manner his views of the law of the case; that one of the arbitrators stated that he should rely upon the chairman's knowledge of the law; that the other arbitrator dissented from the chairman's view; that there was a heated and unfriendly discussion between the chairman and the dissenting arbitrator; and that afterwards the other two arbitrators refused to discuss the question further with the dissenting arbitrator. *Roberts* v. *Old Colony Railroad*, 552.

See CORPORATION, 1, 2; PARTNERSHIP; SPECIFIC PERFORMANCE.

ARREST.

The St. of 1876, *c.* 17, authorizing the arrest of intoxicated persons without a warrant, covers the case of a person found in a public place in a state of intoxication, whether the intoxication was or not produced by means which render the intoxicated person guilty of the crime of drunkenness under the Gen. Sts. *c.* 165, § 25. *Commonwealth* v. *Coughlin*, 436.

See AUTREFOIS ACQUIT.

ASSAULT.

At the trial of an indictment for an assault, there was evidence that A. agreed to sell to B. the business of a firm of which A. and C. were members; that the bill of sale and B.'s promissory note for a part of the consideration were, by agreement of all the parties, deposited with C., to be retained by him until B. should pay the balance of the consideration; that afterwards B. obtained possession of the bill of sale without paying or offering to pay the balance, and, in endeavoring to recover this paper, C. committed upon B. the assault complained of. The judge instructed the jury that the defendant had the right to use the force necessary to prevent B. from keeping the bill of sale, if it was rightfully in the possession of the defendant; but that, if the sale to B. was fraudulent, B. would have a right to retain the bill of sale. *Held*, that the defendant had good ground of exception. *Commonwealth* v. *Lynn*, 218.

See AUTREFOIS ACQUIT; EVIDENCE, 10; SEARCH WARRANT.

ASSIGNMENT.

An assignment, under seal and duly recorded, of wages by A. to "J. B., treasurer," to secure the corporation, of which J. B. was treasurer, for goods it had previously sold and might afterwards sell to A., is valid. *Giles* v. *Ash*, 353.

See DEVISE AND LEGACY, 1; LEASE; MORTGAGE, 1; TRUSTEE PROCESS, 1, 2.

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ASSUMPSIT.

See ACTION, 1; CONTRACT, 1; EVIDENCE, 5; SHIP.

ATTACHMENT.

1. A cornet of a debtor, who is both a musician and a tinner, and who obtains his support by playing upon his cornet and by working at his trade, is, under the Gen. Sts. *c.* 133, § 32, *cl.* 5, exempt from attachment, if the value of the cornet and his tinner's tools is less than one hundred dollars. *Baker* v. *Willis*, 194.
2. Evidence that an officer, who had attached and left without objection certain property in a building, which he kept locked and occasionally visited to look after the property, delivered one of the keys of the same to the owner of other property stored therein, who was in no way connected with the defendant named in the writ on which the property was attached, and who did not carry on business in or otherwise occupy the building, does not, as matter of law, show an abandonment of the attachment. *Commonwealth* v. *Brigham*, 248.

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ATTORNEY AND COUNSEL.

1. In an action by an attorney at law, on an account annexed for professional services, the judge instructed the jury that the plaintiff was bound to possess and exercise ordinary skill and diligence; that the negligence and want of ordinary skill and knowledge on the part of the plaintiff might be considered in determining the value of his services; that if, by reason of his negligence or want of ordinary care and skill, his services were of no value, they might find for the defendant; and that mere error of judgment upon a doubtful question of the construction of statutes should not be regarded as evidence of a want of competent knowledge or skill, or of negligence, but a disregard of a plain statute provision should be so regarded. *Held*, that the plaintiff had no ground of exception. *Caverly* v. *McOwen*, 574.
2. In a criminal case, the court may, at the request of the district attorney, appoint other counsel to assist him at the trial, if the interests of public justice seem to require it, and such counsel acts without any assurance or expectation of compensation from any private person. *Commonwealth* v. *Scott*, 222.
3. A bill of exceptions, to the appointment of counsel in a criminal case to assist the district attorney, showed that there was evidence that the counsel stated to the court that he was present simply by procurement of the district attorney, without any assurance or expectation of compensation from any private source, and that he would be as free to act impartially as when he was district attorney; that he was first applied to by the counsel for a private party interested in the result of the trial, and afterwards by the district attorney; and, when asked whether he stood in such circumstances that he could possibly receive a present from the private party, replied facetiously that he should not care to have his virtue put to any very strong

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test. *Held*, that no error appeared in the decision of the judge, appointing him to act. *Commonwealth* v. *Scott*, 222.

See ARBITRAMENT AND AWARD, 5; EVIDENCE, 25; TRIAL, 1.

ATTORNEY GENERAL.

See MANDAMUS, 2.

AUTREFOIS ACQUIT.

A person who is arrested on a charge of drunkenness by an officer in the discharge of his duty without a warrant, under the St. of 1876, *c.* 17, and who commits an assault upon the officer while under arrest, may be convicted of such assault, although he has been acquitted of the charge of drunkenness in the lower court; such acquittal not being conclusive evidence that he was not drunk when arrested, nor that the officer was not in the discharge of his duty in making the arrest. *Commonwealth* v. *Coughlin*, 436.

AWARD.

See ARBITRAMENT AND AWARD.

BANK.

See CHECK.

BANKRUPT.

1. A creditor of a bankrupt, whose claim is provable but has not been proved in bankruptcy, may, under the U. S. Rev. Sts. § 5106, prosecute to final judgment an action against the bankrupt, if no motion is made for a stay of proceedings, and the assignee does not intervene. *Holland* v. *Martin*, 278.
2. If a defendant in an action of contract, who has been duly adjudged a bankrupt after verdict against him and before judgment, makes application to have the case continued to await the determination of the bankruptcy court upon the question of his discharge, the Superior Court cannot enter judgment, even as of a former day; and the fact that the defendant obtained a delay of the judgment by a frivolous motion for a new trial is immaterial. *Page* v. *Cole*, 93.
3. Where, by the terms of a lease, rent is payable at stated times during the term, and the lessee becomes a bankrupt, the rent is, under the U. S. Rev. Sts. § 5071, considered as accruing from day to day, and an action can only be maintained for that part of the rent which accrued after the bankruptcy. *Treadwell* v. *Marden*, 390.

See EVIDENCE, 6; PAYMENT, 2.

BASTARDY PROCESS.

In a bastardy case, where it appears that no accusation was made in time of travail, evidence that the complainant had never accused any man but the

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respondent of being the father of her child, is inadmissible. *Ray* v. *Coffin*, 365.

BETTERMENT.

1. The board of aldermen of the city of Boston has no authority, since the enactment of the St. of 1871, *c.* 382, to assess a betterment tax for the widening of a street ordered before the passage of that act. *Bigelow* v. *Boston*, 50.
2. A. owned an estate on the corner of K. Street and W. Street, upon which were five stores fronting on W. Street, one extending the whole depth of the estate and four to a private way called B. Place, running back from K. Street, which was parcel of the estate, subject to no easement and kept open for his tenants, and east of which was a building fronting on K. Street, in the rear of which was a dwelling-house abutting on and entered from B. Place. K. Street was widened and two assessments of betterments were laid on the estates on the "corner of K. Street and W. Street," and on the "corner of B. Place," respectively. At the trial of two petitions brought by A. for a jury to revise these assessments, the presiding judge instructed the jury that the assessment in one case applied to all of A.'s land east of B. Place, and in the other to all the remainder of the estate. *Held*, that A. had no ground of exception. *Treadwell* v. *Boston*, 23.
3. On a petition for the revision of a betterment assessed on land for the widening of a street, evidence of the injury to business by the obstruction of the street during the process of widening is inadmissible. *Ib.*
4. The benefit to land caused by the widening of a street is to be assessed according to its value at the date of the widening. *Ib.*
5. On a petition for the revision of a betterment assessed on land at the corner of W. Street and K. Street for the widening of K. Street, evidence that land on K. Street may be best used for lots fronting on W. Street instead of K. Street, is admissible. *Ib.*

See WAY, 4.

BOND.

1. B. gave a bond in the usual form in a penal sum to A. to abide by the determination of arbitrators of a disputed boundary line, and to execute to A. a quitclaim deed of land lying on one side of the line so determined. B. refused to execute the deed and brought a bill in equity to set aside the award, which was dismissed with costs. *Held*, in an action on the bond, that the penal sum could not be treated as liquidated damages. *Held*, *also*, that A. could not recover as damages his expenses in defending the suit in equity. *Henry* v. *Davis*, 345.
2. The sureties on a joint and several bond, given by them with A. and B. as principals, to dissolve the plaintiff's attachment of "the goods and estate of the said A. and B.," the condition of which is that A. and B. shall pay to the plaintiff "the amount, if any, which he shall recover in such action," are not discharged by the discontinuance of the action as to A. *Poole* v. *Dyer*, 363.

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BOUNDARY.

See EVIDENCE, 15; FLATS.

BURDEN OF PROOF

See WILL, 1.

BY-LAW.

1. The Legislature may, in the exercise of the police power, and for the protection of persons and property against the dangers of fire, authorize cities and towns to restrict or prohibit the erection of wooden buildings within the municipality or any district thereof; and all contracts between individuals are subject to the exercise of this power. *Salem* v. *Maynes*, 372.
2. A city ordinance, passed under the St. of 1872, *c.* 243, and providing that a wooden building shall not be built within a certain distance of another wooden building, applies to such a building erected after the ordinance took effect, although, before its passage, work was begun on the cellar upon the site of the proposed building, a contract was made for its erection, and lumber had been bought and prepared in accordance with the contract. *Ib.*

See SAVINGS BANK.

CHARITY.

A testator by his will gave $500 to "the trustees of the high school in D., or their successors in office," "to be applied by said trustees to the advancement of education in said high school." The testator died in 1850, and the trustees invested the fund. The high school was maintained by a voluntary association formed in 1846, acting through trustees, which at that time built, in accordance with an agreement with the inhabitants of the town of D., an additional story upon their new school-house "to be used for a select school and other purposes in such manner as not to incommode" the school district. In 1846 or 1847 the association employed teachers, caused to be kept in the building a private select school, in which were taught the branches of education usually taught in high schools of that time, charged tuition fees which mainly supported the school, and continued to keep the school in substantially the same manner during some part of every year from 1847 until 1866. In 1866, the town established a high school under the Gen. Sts. *c.* 38, § 2, and the association at the same time discontinued its school, and from that time annually until 1875 leased its upper story and hall to the town, at a rent of $80, for the purpose of keeping a high school, reserving the right to use it for other purposes not inconsistent therewith. In 1875, the trustees, acting under a vote of the association, expended $300 out of the fund given by the testator, being the only appropriation of the fund made, and $100 additional, in necessary repair of the hall for the use of the school, the association acting in good faith and in the belief that it was thus carrying out the donor's intention. The association had since leased the hall to the town at an annual rent of $100, which was a reasonable rent, with the

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understanding that the association should restrict its use of the same, when not needed by the school, to lectures and musical rehearsals, the trustees, though they never so stated to the town, considering it less than its rental value, but preferring to so rent it for the advancement of education in the town rather than at a higher rent for other purposes. *Held*, on an information in equity, at the relation of the town, to compel the trustees to pay over the fund, that, even if the trust was a public charity, no ground was shown for controlling the discretion of the trustees, by compelling them to make an immediate expenditure of the moderate sum remaining in their hands or of the rent to be received by them annually from the town, rather than to allow the fund to accumulate to be applied as future necessities or contingencies might arise; and that the town should pay the costs of the information. *Attorney General* v. *Butler*, 304.

CHECK.

A bank which pays out money on a check, purporting to be signed by a depositor, but the signature on which is in fact forged by his clerk, is not, in the absence of evidence that the clerk had, or was supposed by the bank to have, any authority to sign the depositor's name, exempt from liability to the depositor, by proof that the forgery was committed on a blank form taken from the depositor's check book, which was left lying about in his office during the day; that it was stamped with a hand stamp, sometimes used on his checks, and which was accessible to any one in the office; that the clerk was allowed to fill up checks, and was introduced by the depositor to the officers of the bank as the person who was authorized to receive money on the depositor's checks. *Mackintosh* v. *Eliot National Bank*, 393.

CHILD.

See EQUITY, 3; WILL, 4.

CITY.

1. A city, by accepting a statute authorizing it to make and maintain reservoirs and public hydrants "in such places as may be deemed proper," and building its works under it, is not liable to an owner of property destroyed by fire by reason of its neglect in cutting off the water from a hydrant, but for which the fire might have been extinguished. *Tainter* v. *Worcester*, 311.

2. The owner of a building failed to pay water-rates for water supplied to his building by a city, and the city cut off the water from the building and from a hydrant in a street near by, although the water might have been cut off from the building alone. The building was destroyed by a fire, which might have been extinguished had there been water in the hydrant. *Held*, that the owner of the building could not maintain an action against the city for the loss. *Ib.*

3. Authority given by a city council to a committee thereof, on a petition for a hydrant to be attached to a certain line of pipes, to purchase the pipes,

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does not authorize the committee to agree in behalf of the city to maintain the hydrant. *Tainter* v. *Worcester*, 311.

See BY-LAW; EASEMENT; FERRY; MANDAMUS; WATERWORKS; WAY, 1–4.

COMPLAINT.

1. Objections to a complaint, that it does not in terms refer to the statute under which it was brought, nor negative its exceptions, are formal, and cannot, under the St. of 1864, *c.* 250, § 2, be taken, for the first time, in the Superior Court on appeal. *Commonwealth* v. *Lewis*, 251.

2. A complaint under the St. of 1875, *c.* 99, alleged that the defendant "did keep intoxicating liquors with intent to sell the same in this Commonwealth," he "not being then or there appointed, authorized or licensed to sell the same in this Commonwealth for any purpose nor by any legal authority whatsoever." *Held*, that the defects were formal, and could not be taken, for the first time, in the Superior Court. *Commonwealth* v. *O'Keefe*, 252.

3. On a complaint for selling intoxicating liquor, it is a sufficient statement of the name of the person to whom the liquor is alleged to be sold, if the name, by which he was generally known at the time of the sale, is given, although he was baptized by a different name. *Commonwealth* v. *Trainor*, 414.

See WARRANT.

CONDITION.

See DEVISE AND LEGACY, 5.

CONFLICT OF LAWS.

See FOREIGN LAW; PAYMENT; SALE.

CONSPIRACY.

1. On an indictment for breaking and entering a bank, after proof of a conspiracy between the defendant and others, in pursuance of which the bank was entered and robbed, evidence that a director of that bank was taken by one of the conspirators, other than the defendant, to see another conspirator, with whom he had negotiations relative to the return of the stolen property, is admissible. *Commonwealth* v. *Scott*, 222.

2. At the trial of an indictment for breaking and entering a bank with intent to commit larceny therein, evidence of an accomplice of a general conspiracy previously formed between the defendant, himself, and others to rob banks, in pursuance of which the robbery of the bank in question was planned and carried out, as well as of the acts of the conspirators in making preparations for carrying out the robbery, is admissible. *Ib.*

3. After proof of a conspiracy between the defendant and others to rob banks, and that, after a robbery, one of the conspirators met the others at a certain place, evidence that the conspirators had previously arranged for call-

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ing such meetings and for warning each other of danger by means of "personals" in a certain paper, the "personals" so inserted by them, and the paper containing them, are admissible; and whether the defendant did or did not see one of the "personals" inserted to warn him of danger is immaterial. *Commonwealth* v. *Scott*, 222.

CONSTITUTIONAL LAW.

See By-law, 1; Corporation, 3; Judge, 1, 2; Trial, 1.

CONTEMPT.

A conveyance and transfer by a husband of his property, in anticipation of his wife's filing a libel against him for a divorce and for alimony, and with intent to prevent the execution of any decree for alimony that she might obtain, does not of itself constitute a contempt of court; but such a conveyance and transfer, with the fact that the grantees were his son-in-law and daughter, are, upon a petition for an attachment for contempt for neglect and refusal to obey such a decree, competent evidence on the question whether the husband has in his possession or control the means of obeying the order of the court, and is consequently in contempt for disobedience. *Stuart* v. *Stuart*, 370.

CONTINGENT INTEREST.

See Contract, 4; Devise and Legacy, 2.

CONTRACT.

I. *Making.*

1. A., who had bought ice of B., ceased to take it on account of dissatisfaction with B., and contracted for ice with C. Subsequently B. bought C.'s business and delivered ice to A., without notifying him of his purchase until after the delivery and consumption of the ice. *Held*, that B. could not maintain an action for the price of the ice against A. *Boston Ice Co.* v. *Potter*, 28.

See Infant; Insurance, 2; Ship.

II. *Consideration.*

2. A. and B., owners of separate parcels of land, entered into an agreement, by the terms of which B. was to convey his land to A., and, in payment therefor, A. was to convey his land to B., subject to two mortgages, "all taxes, insurance, and interest to be adjusted to September 1." The taxes on the land of A., and the interest on the two mortgages estimated *pro rata* to September 1, amounted to a certain sum, against which the insurance on the estate of A., assigned to B., and the taxes on the estate of B., also estimated *pro rata* to September 1, were offset, leaving a balance to be paid by A. The deeds were passed, and A. paid the balance to B. *Held*, that B. was bound to apply such balance to the payment of interest and taxes on the

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estate conveyed to him; and that an oral promise so to do was for a sufficient consideration. *Williams* v. *Allen*, 391.

See PROMISSORY NOTE, 2, 3.

III. *Validity.*

3. In an action on two promissory notes, it appeared that the defendants were stockholders in, and directors of, a corporation in which the plaintiff was also a stockholder; that the plaintiff and the defendants with other stockholders voted at a corporate meeting to authorize the directors to lease all the lands of the corporation; that the directors executed a lease to an association composed of themselves, which lease was ratified by a stock vote of the corporation, the plaintiff voting in favor of it and giving assurances that he would become a member of the association; that, at this time, the plaintiff had an interest in a decree obtained in a court of chancery against the corporation as trustee, the amount of which had not been judicially determined; that the plaintiff prevailed on the defendants, acting as directors, to assent to an entry of judgment for the sum claimed, by reason of which the plaintiff was enabled to obtain precedence over several cases then pending against the corporation; that the plaintiff assigned to the defendants this judgment and another judgment which he held against the corporation, and took the notes in suit in payment therefor, made by the association and indorsed by the defendants; that the plaintiff represented to the defendants that the association would be thereby enabled to acquire title to all the property of the corporation by a legal early sale thereon, and exclude the other stockholders from any interest therein, and prevent other creditors from collecting their claims; and that the plaintiff's attorneys gave assurances that they would make the plaintiff become a member of the association. *Held*, that no fraud appeared on the part of the plaintiff which made the consideration of the notes illegal as against public policy, and that the plaintiff was entitled to judgment. *Cole* v. *Boardman*, 548.

See INTOXICATING LIQUORS, 1; SPECIFIC PERFORMANCE.

IV. *Construction.*

4. A testator by his will devised an estate to his daughter A. for life, with remainder in fee to such children as should be living at the time of her decease. A. had three children, B., C. and D., of whom B. died in her lifetime, leaving two children. Thereupon in A.'s lifetime D. and C. executed and delivered an agreement, without consideration, to the mother of B.'s children, which recited the devise under the will, and that B.'s children might thereby be excluded from participation in the estate, and their belief that it was the testator's intention that the estate should be equally distributed among A.'s descendants, and stated that they renounced any and all claim to the portion of the estate "which would have belonged to B. had he lived, in favor of his children and their heirs forever, confirming it to them, and will defend the rights of said children and their heirs" to the estate against every claimant under the testator's will, so that they could

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hold it as fully as if B. had survived A. The agreement also recited that the children of D. and C. might be placed in the same position as B.'s children, and stated that they confirmed to each other's children the proportion of the estate in the same manner as if they with B. had survived A. Subsequently the children of B. died unmarried, without issue and intestate, in the lifetime of A., whom D. and C. survived. *Held*, that B., C. and D. took a contingent remainder in the estate, and that, under the agreement, D. and C. undertook, in case they and any child or children of B. survived A., to convey to such child or children an undivided third part of the estate in fee; and that by the death of B.'s children the agreement, together with the covenant to defend, became of no effect. *Hastings* v. *Hastings*, 158.

See CONTRACT, 2; EQUITY, 8; MORTGAGE, 10; WARRANTY.

CORPORATION.

1. A corporation chartered for the purpose of publishing pious and useful books and tracts for distribution among the ignorant and destitute, with power to sue and be sued, to appear in court to prosecute and defend to final judgment and execution, to take, possess and apply to the purposes of the corporation any moneys which may be given for immediate use, to hold as a permanent fund any estate, whether real or personal, the yearly income of which shall not exceed fifteen hundred dollars, the same to be faithfully appropriated to the object aforesaid, and not otherwise, may, if its income from the permanent fund does not exceed that amount, receive a sum of money on the condition that it will return it, if an additional amount is not raised within a certain time; and, if a demand is made for the return of the money, on the ground that the condition has not been complied with, may submit the demand to arbitration under the Gen. Sts. *c.* 147. *Morville* v. *American Tract Society*, 129.

2. If a corporation, in excess of the powers conferred by its charter, receives a sum of money on condition that it will return it, if an additional sum is not raised within a given time, and the condition is broken, an action may be maintained against the corporation on an implied promise to return the money, and a demand for its return may be submitted to arbitration. *Ib.*

3. A charter of a corporation, granted subsequently to § 41 of the Gen. Sts. *c.* 68, may, under the power reserved in that section, be repealed by the Legislature. *Thornton* v. *Marginal Freight Railway*, 32.

4. Under the Gen. Sts. *c.* 68, §§ 36, 37, continuing every corporation whose charter has been annulled, for the term of three years afterwards, for the purpose of prosecuting and defending suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock, and giving this court power to appoint a receiver, at any time within said three years, to do all acts which might have been done by the corporation if in being, necessary for the final settlement of its unfinished business, a judgment recovered against a corporation after the expiration of three years from the repeal of its charter no receiver having been appointed, is void. *Ib.*

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5. By the St. of 1872, *c.* 342, the charter of the Marginal Freight Railway Company was repealed, and the Union Freight Railroad Company was incorporated, with power to take the tracks of the former company, making compensation therefor in a manner provided. The St. of 1876, *c.* 229, authorized certain railroad corporations to hold stock in the Union Freight Railroad Company, and provided that nothing in the act contained should be construed as affecting the legal rights of the Marginal Freight Railway Company. *Held*, that this act could not be construed as a legislative recognition that the last named company had, at the time of the passage of the act, an existence or any legal rights. *Thornton* v. *Marginal Freight Railway*, 32.

6. If a certificate of shares in the capital stock of a corporation is taken without the owner's knowledge, and, together with a forged power of attorney, is delivered to an auctioneer for sale, to whom the corporation issues a new certificate in the name of the auctioneer, who delivers it to an innocent purchaser for value, to whom, in turn, on its presentation, the corporation issues a new certificate, the owner is entitled, on a bill in equity against the corporation and purchaser, to a decree to compel the corporation to issue to him a certificate for his shares and to pay him the dividends thereon, but not to a decree against the purchaser; and, upon such a bill, the court cannot decide, unless by consent, whether the corporation is liable to the purchaser. *Pratt* v. *Taunton Copper Co.* 110.

See ARBITRAMENT AND AWARD, 2, 4; EQUITY, 2; TAX, 3.

COSTS.

1. If a writ, duly served upon a person summoned as trustee of the principal defendant, is not entered, and he appears and files a complaint at the first term, he is entitled to judgment for his costs; and his right to file such a complaint is not affected by his having filed an answer. *Duffee* v. *Call*, 318.

2. In a trustee process, a person summoned as a trustee has a right to be heard on the validity of an assignment to an adverse claimant, and is entitled to costs while attending, for that purpose, the court in which it is pending. *Washburn* v. *Clarkson*, 319.

See CHARITY; NEW TRIAL, 3; WIDOW.

COURT.

See JURISDICTION; POLICE COURT; REMOVAL OF ACTION.

DAMAGES.

See BOND, 1; JURISDICTION.

DEATH.

See DEVISE AND LEGACY, 5.

DEED.

An indenture between A. and B., executed with the declared intention to establish, between the wharves and estates of A. and the estate of B. and any

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wharf that might be built thereon, an open dock and common passageway for ships, boats and other craft, contained an express grant from A. to B., his heirs and assigns, of the right and use of such an open dock and passageway, and a corresponding grant from B., who claimed some rights in the dock by virtue of his title in an existing wharf of his own, to A.; authorized B., his heirs and assigns, to fill up a small triangle of the flats at the head of the dock as a wharf or road; recited that A. "does hereby remise, release, bargain, sell and convey" to B. a small part of A.'s wharf; "the estate so above conveyed to be subject to all the conditions, agreements and covenants heretofore made;" acknowledged the right of B. to build his wharf in such a way that there would be two projections into the dock, and concluded with a grant and quitclaim to B., his heirs and assigns, of all A.'s right and title in the land which might be covered by the wharf to be built by B. *Held*, that the fee in the soil of the open dock, or of any part of it, did not pass to B. *Central Wharf* v. *India Wharf*, 561.

See EASEMENT; FLATS; MONEY HAD AND RECEIVED, 1.

DEMURRER.

See PLEADING, 2.

DEVISE AND LEGACY.

1. A bequest in a will of all the testator's interest in a certain described estate operates as an assignment of his interest as lessee in the estate. *Martin* v. *Tobin*, 85.

2. A testator, by his will, gave his parents the use and improvement of all his estate, both real and personal, "and so much of the estate itself as may be necessary for their comfortable support so long as either of them shall live;" and "at the death of my parents" devised to a sister and a friend, "should either of them be living," a certain part of the remainder; and, "after the above bequests have been taken out of the estate," directed that the residue should be equally divided between persons named. *Held*, on a petition for the sale of the real estate, under the St. of 1868, *c.* 287, that the devise over was a contingent remainder. *Held, also*, that the will created no trust estate, either expressly or by implication, and that a decree of the Probate Court dismissing a petition filed under the St. of 1869, *c.* 331, for the sale of the real estate, on the ground that the remainder was vested, was not a bar. *Bamforth* v. *Bamforth*, 280.

3. A testator, by his will, devised to his wife "all my estate, both real and personal, that shall remain after the payment of my debts and funeral charges, for her comfortable support and maintenance during her life, with full power and authority to dispose of the same as she may find needful for that purpose." The will also devised to A. "all the estate, both real and personal, of which I shall die seised and possessed, after the death of my said wife, to him, his heirs and assigns forever, if he shall then be living." A. survived the widow, who made no disposition of the real estate in her lifetime, but by her will devised it to B. *Held*, that the widow took only

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an estate for life with a power to sell, and, that power not having been exercised in her lifetime, the devise over to A. took effect. *Smith* v. *Snow*, 323.

4. A testator, by his will, after giving certain legacies and an annuity to his son W. during his life, to be paid out of the income of the estate, directed that "after the decease of W., provided he shall live until his youngest child shall have attained the age of twenty-one years," the residue of the estate should be divided into two parts, and one of these parts should be distributed among the children of W.; that if W. should die before his youngest child had attained the age of twenty-one years, such division should not be made before his youngest child had reached that age or would have reached it if living; that "during the time intervening between the death of W. and the time when his youngest child arrives at the age of twenty-one years," his children or their heirs should receive *pro rata* the annuity which their father would have received if living; that a similar distribution of the remaining half of the residue should be made among the children of W. when the youngest had attained the age of thirty years, with a provision that if the children should have made bad use of the money previously paid over to them under the will, the estate, or so much of it as might be necessary for their benefit and support, should be kept in trust for them; and that in case W. should be living at the time his youngest child should have attained the age of thirty years or would have attained that age if living, the distribution of the latter half of the residue should not be made until after the death of W., but should be kept for the purpose of paying his annuity out of the income of it, and, if necessary, out of the principal. *Held*, that no part of the residue was to be distributed until after the death of W. *Merritt* v. *Converse*, 338.

5. A. by his will devised certain real estate to his son B., on the condition that B. should provide for the support of his brother C., "but if said B. shall neglect or refuse to perform and accept" the condition named, then the estate should go to D., upon the same condition, "but not otherwise." C. died in the lifetime of the testator, unmarried and without issue. *Held*, that the condition became impossible by the act of God, and that B. had an absolute estate. *Parker* v. *Parker*, 584.

6. A testator, whose daughter (who was forty-six years of age and had been a widow for four years prior to the date of the will) and her children survived him, by his will bequeathed a certain sum in trust "to accumulate until my said grandchildren last mentioned respectively attain the age of thirty-five years, when a proportionate part of said fund and accumulation (dividing by the number of said grandchildren then living who shall not have received their share) is to be paid over to each of them; and in case of the last beneficiary, before attaining the age of thirty-five years, I direct that the remainder of said fund and accumulation be considered as part of the residue of my estate." The will contained no prior mention of any grandchildren. *Held*, that unless the words "said" and "last mentioned" were rejected, the bequest was void for uncertainty; that, if rejected, the

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bequest was void for remoteness; and that the residuary legatee was entitled to the fund. *Hall* v. *Hall*, 120.

See CONTRACT, 4.

DISTRICT COURT

See JURISDICTION

DIVORCE.

See CONTEMPT; REPORT.

DOG.

1. Under the St. of 1867, *c.* 130, § 1, a license to keep a dog, which is described therein only as a "male dog" is insufficient. *Commonwealth* v. *Brahany*, 245.
2. Under the St. of 1867, *c.* 130, § 1, a license to keep a "yellow and white" dog named "Dime," will not authorize the keeping of a black Newfoundland dog named "Nigg." *Ib.*
3. In an action under the Gen. Sts. *c.* 88, § 59, the declaration alleged that the defendant's dog "attacked and bit the plaintiff, and wounded her in the arm." There was evidence at the trial that the dog was muzzled, and could not, with the muzzle on, have bitten the plaintiff; and that the muzzle had two buckles on it. The plaintiff testified that the dog bit her, and that the buckles did not cause the injury. The jury were instructed that if the dog wounded the plaintiff by biting her, the action could be maintained; but unless it was proved that the dog bit the plaintiff, the action could not be maintained. *Held*, that the plaintiff had no ground of exception to the instructions; and that it was not open to her to contend in this court that the instructions were erroneous, because the jury might have found that the injury was caused by the buckles. *Searles* v. *Ladd*, 580.

DRUNKENNESS.

See ARREST; AUTREFOIS ACQUIT.

EASEMENT.

1. A city, for the purpose of widening a street, purchased a lot of land with a building thereon, which had by prescription an easement in a chimney standing on an adjoining lot of land, took down the building, appropriated the greater part of the land to the widening of the street, allowed the rest of the land to lie vacant for six years, and then conveyed it by deed of quitclaim. *Held*, that the easement in the chimney was lost by abandonment, and did not pass to the grantee. *Canny* v. *Andrews*, 155.
2. A., the owner of a wharf in a city, and of the land under a dock lying between his wharf and wharves of B., granted to B. and his heirs "the right and use of an open dock for all ships, vessels, boats and floats of every description, with free ingress and egress for the same at all times to and from

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his and their said wharves and estates, and every part thereof in and over" the dock. The deed also contained the following clauses: "The said dock is forever to remain open and to be a common passageway as aforesaid to the parties." "No fixtures or buildings of any kind are to be erected within the bounds above described as said dock, nor any unnecessary obstructions or impediments permitted thereon." Subsequently the parties executed an indenture reciting the above clauses, and providing that they might make certain changes in the boundaries of the dock, all of which were outside of a certain street which the city contemplated building across the dock; and that if the project of the street was abandoned, then A. might make an extension of his wharf inside of the line of the street as shown on a plan annexed; and that neither party abandoned or surrendered any other rights in the dock or wharves "excepting as is herein expressly stated." Shortly after this, the city laid out and constructed the street across the dock and filled up the dock between the street and the shore, under authority of a statute giving the city a lien on the land so filled for the cost of the same. A. thereupon put up buildings on the land so filled. *Held*, in an action of tort against A., for obstructing B.'s right of way, that B.'s easement in the land was limited to an open dock and common passageway for vessels; that the other covenants were incidental to the grant of this easement; and that the easement was extinguished by the act of the city. *Central Wharf* v. *India Wharf*, 567.

EMINENT DOMAIN.

See WATERWORKS.

EQUITY.

I. *Jurisdiction and General Principles.*

1. A bill in equity, alleging that the defendant had agreed to pay the plaintiff a certain commission upon merchandise consigned to the defendant, either by the plaintiff or by other persons; that large amounts had been so consigned, but to what extent the plaintiff was ignorant; that the accounts were too complicated to be conveniently adjusted in an action at law; and praying for an account and for a discovery of such other persons, cannot be maintained; either for an account or for discovery, if the bill waives an answer under oath. *Badger* v. *McNamara*, 117.

2. This court has no jurisdiction in equity of a bill by a creditor against a corporation to apply, to the payment of a judgment, property of the debtor in the hands of a third party, if the judgment was invalid at the time it was recovered, and the corporation had ceased to exist. *Thornton* v. *Marginal Freight Railway*, 32.

See CORPORATION, 6; EXECUTOR AND ADMINISTRATOR; MONEY HAD AND RECEIVED, 1; MORTGAGE, 3–6; SPECIFIC PERFORMANCE; TAX, 2.

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II. *Pleading and Practice.*

3. Where A. claims the rights of a child and an heir in an intestate's estate under an indenture between the intestate and wife and A.'s father, and also under an adoption, according to a statute and a judicial decree, the question of his rights under the contract will not be determined by a bill in equity until his status as a child of the intestate has been settled in an action at law or in the Probate Court. *Ross* v. *Ross*, 212.

4. A decree of a judge in equity, making an allowance of interest in accordance with a finding of a master, to which no exception was taken, cannot be revised on an appeal to the full court. *Popple* v. *Day*, 520.

See CHARITY; PARTNERSHIP.

ERROR.

A judgment upon default upon two counts alleged in the declaration to be for the same cause of action will not be reversed if either count is sufficient. *Mullaly* v. *Holden*, 583.

ESTATE FOR LIFE.

See DEVISE AND LEGACY, 3.

ESTATES OF DECEASED PERSONS.

See EQUITY, 3; EXECUTOR AND ADMINISTRATOR; TAX, 1.

ESTOPPEL.

In an action against an officer for the proceeds of a chattel attached and sold by him on mesne process against the plaintiff, the officer is not estopped by his return to deny the plaintiff's property. *Rogers* v. *Cromack*, 582.

EVIDENCE.

1. Notice to a party to produce a letter, which he has testified he had not in his possession and had never received, is unnecessary as a preliminary to the introduction of a copy of the letter in evidence. *Roberts* v. *Spencer*, 397.

2. If a question is put to a witness on cross-examination, which is collateral or immaterial to the issue, his answer cannot be contradicted. *Eames* v. *Whittaker*, 342.

3. In an action for personal injuries caused by an obstruction in a highway, where the evidence is conflicting as to the cause of the accident and the general character of the horse which the plaintiff was driving at the time of the accident, evidence of the character and habits of the horse, as well after as before the accident, is admissible. *Maggi* v. *Cutts*, 535.

4. In an action for the use of a derrick, upon evidence being put in by the defendant that a block and chain on the derrick broke in using it, the plaintiff may put in evidence that it is a usual thing for blocks and chains on any derrick to break when in use. *Reilly* v. *Rand*, 215.

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5. A claim for the use of a chattel for a certain time is supported by proof that, during that time, the defendant had it in his possession, with the right to use it whenever he pleased. *Ib.*

6. On the question whether A. knew that B. had withdrawn from a partnership before A. made a contract with it, newspapers regularly taken by A., containing statements as to the dissolution of the firm and B.'s retirement from it, are admissible; and A.'s affidavit to the proof in bankruptcy, against the other partners only, of his claim under the contract, is admissible, for the same purpose, and to contradict A.'s testimony that he supposed B. to be a member of the partnership, and relied upon him in making the contract. *Roberts* v. *Spencer*, 397.

7. In an action of tort, by the assignee of a lease of land, for a trespass, evidence that his assignor wrongfully used money in his possession as guardian in the purchase of the lease is irrelevant and inadmissible. *Martin* v. *Tobin*, 85.

8. At the trial of an indictment for breaking and entering, a witness may testify that, a few days before, he sold to a man certain articles of clothing like those left by the offender near the scene of the crime, there being other evidence tending to show that that man was the defendant. *Commonwealth* v. *Scott*, 222.

9. If a witness testifies, without objection, as to the valuation which the assessors of a town had put upon a parcel of land, it is within the discretion of the judge to allow the party calling the witness to put in the assessors' valuation, for the purpose of correcting the testimony of the witness. *Truro* v. *Freeman*, 187.

10. On an indictment for an assault with intent to ravish, the person assaulted testified that the defendant assaulted her; that she knew where he lived; and that during the same week she made complaint to the officer who made the arrest. The government offered evidence of what she told the officer at that time, which, upon the defendant's objection, was excluded. The defendant, for the purpose of showing that she did not tell the officer that he was the man who assaulted her, offered to prove that, up to his arrest, he was generally at his home, and that no effort was made to arrest him until a week after the alleged assault. The defendant still objecting to the evidence offered by the government which had been excluded, the judge declined to admit the evidence offered by the defendant. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Fitzgerald*, 408.

11. A witness who testifies of a sale of intoxicating liquor by the defendant may, for the purpose of fixing the time, state that he testified of the same sale at the preliminary hearing before a magistrate. *Commonwealth* v. *Sullivan*, 221.

12. At the trial of charges of fraud under the Gen. Sts. *c.* 124, §§ 31–34, the alleged fraud being that the debtor had bought land and had caused it to be conveyed to his wife in fraud of his creditors, if it appears that a part of the consideration was procured by means of a mortgage to a third person by the debtor and his wife, given to secure the debtor's sole note which it

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was contended that he afterwards paid, the mortgage is admissible in evidence. *Anderson* v. *Edwards*, 273.

13. On the trial of an indictment for procuring an abortion, there was evidence of an arrangement to meet the defendant and bring him to the place where the alleged crime was committed; and the district attorney argued that the arrangement was made to bring the defendant for the purpose of procuring the abortion. *Held*, that, if there was direct evidence of his guilt from other circumstances in the case, evidence offered by the defendant to show that the arrangement was for another purpose was immaterial. *Commonwealth* v. *Blair*, 242.

14. Evidence admissible to prove a crime charged is not made inadmissible because it tends to prove other crimes. *Commonwealth* v. *Scott*, 222.

15. On the issue of the location of a disputed boundary line, an experienced surveyor may testify that, in his opinion, a mark upon a certain tree was such as a surveyor would make, and that a certain pile of stones was, in his judgment, an ancient monument. *Knox* v. *Clark*, 216.

16. A. sold a sewing machine to B. under an agreement in writing, by the terms of which the title was to vest in him on payment of the price. In an action of replevin of the machine by A., there was evidence that A.'s agent delivered the machine to B. and agreed to take in part payment labor performed by B. for him. B. offered evidence that, prior to the execution of the agreement, he told A. of his agent's agreement, and A. assented thereto; and that, after the execution of the agreement, A.'s agent told him that part payment should be so made, and that A. agreed thereto. The presiding judge refused to instruct the jury that if the agent had authority to make the agreement, they must find a verdict for A.; that a performance of the agreement by B. would not vest the title in him, and that A. would still have such title as would enable him to maintain his action; but instructed them that if the agent had authority to make the agreement, and B. performed it, then A. had no such title to the property as would enable him to maintain the action. *Held*, that the evidence was admissible, on the questions whether A.'s agent had authority to modify the written agreement, and whether he did modify it. *Held*, *also*, that A. had no ground of exception to the refusal to give the instructions requested, or to those given. *Shaffer* v. *Sawyer*, 294.

17. On a complaint under the mill act, describing the land flowed as conveyed to the complainant by a certain deed, which referred to other deeds for a description of the land, a witness may testify at the trial before the sheriff's jury that he knew what land the deeds conveyed and that it was the land flowed, although the other deeds are not put in evidence. *Hadley* v. *Citizens' Savings Institution*, 301.

18. A person who is held in custody on a charge of crime jointly with another person is not called upon to contradict statements prejudicial to him, made in his presence by the other person, in answer to inquiries made by an officer; and such statements, though not contradicted by him, are not admissible in evidence against him. *Commonwealth* v. *McDermott*, 440.

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19. A defendant in a criminal case, not under oath as a witness, is not entitled to repeat something in the presence of the jury, to rebut evidence of a witness for the government, who testified that he identified the defendant by his voice. *Commonwealth* v. *Scott*, 222.

20. In an action for the conversion of goods, attached by the defendant in a shop as the property of the person in possession, and claimed by the plaintiff under a previous sale from that person, there was evidence that the seller conducted the business of the shop, after the sale, in the same manner as before. *Held*, that evidence that the seller, after the sale and before the attachment, told a person that the goods he was then buying belonged to the plaintiff, who had bought him out, was admissible to show that, after the alleged sale, purchases and sales of goods were made by the plaintiff, or in his name. *Place* v. *Gould*, 347.

21. Where, in a criminal case, the testimony of an accomplice is corroborated by other evidence, the judge is not required to advise the jury to acquit; and an instruction advising them of the suspicious character of his testimony, and that it was not safe to convict unless it was corroborated in some portion material to the issue, affords the defendant no ground of exception. *Commonwealth* v. *Scott*, 222.

22. Books of account of a bank, supported by the oaths of its treasurer and the clerk who made the entries therein, identifying the books, although they had no personal recollection of the facts, are admissible in evidence, to prove an account therein. *Anderson* v. *Edwards*, 273.

23. On the issue whether a person, charged with receiving stolen goods, knew them to be stolen, evidence of the thief's reputation in the community, and among those by whom he was known, as to his being a regular and honest dealer in goods such as were stolen, is admissible. *Commonwealth* v. *Gazzolo*, 220.

24. In an action on a promissory note, begun more than six years after the cause of action accrued, the note purported to be signed in the presence of an attesting witness, who testified that he was formerly an office-boy for the plaintiff, and was, at the date of the note, eleven and a half years old; that the name looked like his handwriting; that he thought it was; that he could not tell under what circumstances it was put there; that he had no recollection whatever about it; that, if he signed it, he must have seen the defendant sign it, or have known that he signed it. *Held*, that the evidence was competent, and sufficient to be submitted to the jury, on the issue whether the note was signed in the presence of an attesting witness. *Tompson* v. *Fisher*, 559.

25. In an action by an attorney at law, on an account annexed for professional services, the record of the case in which the plaintiff's services were rendered, and a statute of the Commonwealth, both bearing directly upon the plaintiff's negligence or want of skill in advising and prosecuting the suit, are admissible in evidence against him. *Caverly* v. *McOwen*, 574.

See APPEAL, 2; ARBITRAMENT AND AWARD, 2, 3; ATTACHMENT, 2; AUTREFOIS ACQUIT; BETTERMENT, 3, 5; CONSPIRACY, 1–3; CONTEMPT

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EXCEPTIONS, 5–7; FOREIGN LAW; GOODS SOLD AND DELIVERED, 1–3; INFANT; INSURANCE, 6; INTOXICATING LIQUORS, 2–6; LARCENY, 2, 3; MARRIED WOMAN, 2; MORTGAGE, 7; PARTNERSHIP; POOR DEBTOR, 2; PROMISSORY NOTE, 3; SHIP; WAY, 5, 6; WILL, 1, 2, 4; WITNESS.

EXCEPTIONS.

1. If the time for the filing and presentment of exceptions has been extended, under the Gen. Sts. *c.* 115, § 7, by the presiding judge, to a particular day, and this day is a legal holiday, and the excepting party fails to present them until the next day, the exceptions will be dismissed, if the adverse party takes the objection before the allowance of the exceptions. *Cooney* v. *Burt*, 579.
2. An order of a justice of this court, on a probate appeal, declining to submit particular issues of fact to a jury, cannot be revised by bill of exceptions, but only by appeal. *Davis* v. *Davis*, 590.
3. By the Gen. Sts. *c.* 115, § 7, no exception lies to a judgment of the Superior Court sustaining a motion to dismiss an action for want of proper service of the writ. *Kennedy* v. *Langdon*, 193.
4. No exception lies to the refusal of a presiding judge to order separate trials upon an indictment containing two counts, each charging the keeping and maintaining of a distinct tenement for the illegal sale and illegal keeping of intoxicating liquors. *Commonwealth* v. *McCluskey*, 401.
5. It is within the discretion of a judge to exclude evidence offered by a plaintiff in rebuttal, which would have been competent as a part of his case in chief. *Eames* v. *Whittaker*, 342.
6. An exception cannot be sustained to the exclusion of evidence which is not reported or stated in the bill of exceptions. *Morville* v. *American Tract Society*, 129.
7. The admission, subject to the defendant's objection, of evidence which the jury are afterwards instructed to disregard, affords the defendant no ground of exception, if the evidence is competent. *Commonwealth* v. *Scott*, 222.
8. No exception lies to the refusal of a judge to give an instruction which assumes a fact to be proved which is in controversy. *Ely* v. *James*, 36.
9. No exception lies to the refusal of a judge, at the close of his charge to the jury, to give an instruction which is covered by the instructions already given. *Brown* v. *Dean*, 254.
10. The omission of a judge to observe, in his charge to the jury, upon a particular point not suggested at the trial, cannot, if no misdirection is shown, be taken advantage of under a general exception to his whole charge, although all the evidence is stated in the bill of exceptions. *Armour* v. *Pecker*, 143.
11. In an action on an account annexed for work and labor, the evidence in which disclosed a special contract, not in writing, the plaintiff requested the judge to put several specific questions to the jury, but the judge refused, and directed the jury to return a general verdict. *Held*, that the plaintiff had no ground of exception. *Riley* v. *Williams*, 506.

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12. On the issue whether A., by failing to object to a purchase of certain bonds by B. on A.'s account, had ratified the purchase, A. contending that he only authorized the purchase of registered bonds, while those bought were unregistered, A. testified that he knew from his wife that the bonds had been bought; that it was a tabooed subject between them; that she grew very excited over it; that they had lost all confidence in the bonds, and considered them worthless two years before he repudiated the purchase; that he knew it from what a third person told him; that this person said that B.'s reputation was not worth a copper; that he would not leave a ten-dollar bill with him. The judge, in instructing the jury, called their attention to the fact that the plaintiff had testified that he knew the bonds were worthless, that he had lost his money, and that the subject was so painful to his wife that it was tabooed between them; but omitted to state what the plaintiff testified as to his means of knowledge, and left it to the jury to say whether it was a fair inference from the plaintiff's testimony, that, two years before the repudiation, he was in possession of knowledge that his instructions to B. had not been complied with. *Held*, that A. had no ground of exception. *Matthews* v. *Fuller*, 446.

13. A bill of exceptions, alleged by the respondent at the trial upon a petition to the Superior Court to assess the damages caused to the estate of three petitioners, owned by them in common, by relocating a highway, stated that the respondent offered to prove that, at a hearing before the county commissioners, before the order of relocation was adopted, one of the petitioners verbally agreed that the petitioners would accept a certain sum in full for damages to their estate; that the respondent also offered to prove by another witness that he, by authority of two of the petitioners, informed the county commissioners that if a certain location was adopted, (which was afterwards in fact adopted,) the petitioners would accept the same sum in full for damages; and that, the respondent not proposing to show that the third petitioner gave any authority to make either offer, the judge rejected the evidence. *Held*, that no ground of exception appeared. *Britton* v. *Worcester*, 309.

See ATTORNEY AND COUNSEL, 1, 3; BETTERMENT, 2; DOG, 3; EVIDENCE, 10, 16, 21; LARCENY, 3; MASTER AND SERVANT, 2; NEW TRIAL; PAYMENT, 2; RECEIVING STOLEN GOODS, 1; TRIAL, 2; VERDICT, 2; WATERCOURSE; WITNESS.

EXECUTION.

If the owner of a mill holds it in fee simple at the time of the institution of a complaint for flowing land, under the Gen. Sts. *c.* 149, and mortgages it pending the proceedings, a levy and sale on execution, issued on a judgment recovered on such complaint, which describe the interest taken and sold as an equity of redemption, pass no title. *Wight* v. *Barnstable Savings Bank*, 183.

See ATTACHMENT, 1.

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EXECUTOR AND ADMINISTRATOR.

Pending an action against several defendants, on a joint contract, one of them died, and judgment was recovered against the surviving defendants more than two years after letters of administration had been taken out on the estate of the deceased. This judgment was paid by all the judgment debtors except one, who was insolvent. *Held*, that they could not maintain a bill in equity for contribution against the administrators of the estate of the deceased. *Spelman* v. *Talbot*, 489.

See JUDGMENT; PROMISSORY NOTE, 3.

FERRY.

By the St. of 1852, *c.* 244, the East Boston Ferry Company was incorporated for the purpose of establishing and supporting a ferry between the main land in the city of Boston and the island of East Boston, and was allowed to collect and receive such tolls as the mayor and aldermen should determine; and the city of Boston was authorized, at any time during the continuance of the charter, to purchase the ferry and franchise of the company, and to issue scrip in payment therefor, and thereupon to collect the same rates of toll as were allowed to the company; provided that whenever the tolls collected should be sufficient to reimburse the city for the cost of the ferry, with annual interest on the scrip, and for all the expenses of the repairs and additions to the ferry, and all current and incidental expenses of its superintendence and its management, and to provide a sufficient fund for its future support, "then the tolls on said ferry shall cease, and said ferry shall ever after be maintained by said city of Boston as a free ferry." By the St. of 1869, *c.* 155, § 1, the city council, "for the purpose of improving private property, and of protecting the same and the travel and business between the main land in said city and East Boston from the disabilities and burdens of the ferry communications heretofore existing between said parts of the city, and of furnishing additional facilities to said travel and business," was authorized to purchase the ferry and franchise of the company, and to cause the ferry to be maintained "in such manner and upon such rates of ferriage as the board of aldermen of said city shall from time to time judge the best interests of the said city to require, excepting only as hereinafter provided." By the subsequent sections of this statute, the city council, "upon the completion of said purchase," was authorized to determine whether the interests of the city would be best promoted by maintaining the ferry free of tolls, either "thereafter" or "for a term of not less than ten years next succeeding said purchase;" and, if either of these alternatives was adopted, the board of aldermen was to adjudge whether East Boston, or any and what part thereof, would receive special benefit and advantage from the purchase, and provision was made for the assessment and levy of a portion of the cost upon the owners of real estate in the territory so adjudged to be benefited. In 1870, the city purchased the ferry, and maintained it for seven years afterwards at rates of toll fixed by the

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board of aldermen. *Held*, that the city council could not now determine to run the ferry free of toll. *Attorney General* v. *Boston*, 460.

See MANDAMUS.

FIXTURE.

A mortgage of a building covers an engine and boiler, a steam-gauge, a water tank, a steam-pump connected therewith, and the shafting therein, intended to permanently increase the value of the building for occupation; but not machines which are incidental merely to the particular business carried on in the building at the time, although some of them are attached to the building by nails or bolts. *McConnell* v. *Blood*, 47.

FLATS.

Commissioners appointed to set off dower and make partition among heirs made a return, which was accepted by the court, by which they set off to the widow a lot, on the north side of a tide-water cove, described by metes and bounds running "to the shore," and thence by courses and distances, which there was evidence tending to show corresponded with high-water mark, "to G. B.'s shore," which was in fact a parcel of marsh or meadow, and not part of the estate divided; also three lots of upland; "and also a privilege to have and take off the one third of the seaweed that may wash up on the shore of the lots by the cove and river, which privilege last mentioned is to be divided equally between" the widow and the two sons, "on all the land adjoining the river and cove; all which four lots of land, together with the privileges above described, we have set off to the said" widow for her dower. The commissioners set off to one of the sons a lot on the south side of the cove, bounded "by the cove and river," "excepting two thirds of the shore or seaweed that may wash up on the land or shore;" and did not otherwise dispose of the shore, between high and low-water mark, of the lot set off to the widow. *Held*, that her title extended to low-water mark. *Hathaway* v. *Wilson*, 359.

See DEED; EASEMENT, 2.

FLOWING LAND.

See EVIDENCE, 17; EXECUTION; MILL.

FOREIGN LAW.

The law of another state must be proved as facts are proved; but, if the evidence admitted consists of a judicial opinion, its construction is for the court *Ely* v. *James*, 36.

See PAYMENT; SALE.

FORGERY.

See CHECK; CORPORATION, 6; MONEY HAD AND RECEIVED, 2–4.

FRAUD.

See MORTGAGE, 3–6; PROMISSORY NOTE, 5; WILL, 2.

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FRAUDS, STATUTE OF.

1. If A. builds upon land in the possession of B., as lessee, in consideration of an agreement by B. to give him a sub-lease of it, which the lessee refuses to fulfil, he can maintain an action against B. for the cost of the building, although the agreement for the sub-lease is within the statute of frauds. *Parker* v. *Tainter*, 185.

2. An agreement to take all the leather of a certain thickness forming part of a large pile, from which it was afterwards to be selected by the seller, the receipt of part of the leather by a common carrier, not expressly authorized by the buyer to accept it, and the acceptance by the buyer of that part, but with no intention to perform the whole contract, are not a sufficient acceptance to take the sale out of the statute of frauds. *Atherton* v. *Newhall*, 141.

See PLEADING, 1; WORK AND LABOR.

GENERAL AVERAGE.

See INSURANCE, 9.

GOODS SOLD AND DELIVERED.

1. In an action on an account annexed for wood sold to A., the report of an auditor stated that the plaintiff sold the wood in question to B., who was then engaged in manufacturing bricks for A. under a written agreement, by which A. was to furnish all necessary materials for making the bricks except the clay; that the wood was delivered at the brick-yard, occupied by B., and there used by him in making the bricks for A.; that A. frequently visited the yard while the wood was being so used, and in fact sold a part of the bricks after they had been manufactured; that the plaintiff, at the time of the sale to B., was ignorant of the agreement between A. and B., and of the fact that any person except B. had an interest in the business, and was first informed of it within a week before suit was brought; that, in the meantime, A. and B. had made a final settlement of their accounts, in which A. gave up to B. certain promissory notes held against him, and B. released to A. his claim for making the bricks, and executed to him a receipted bill for the wood, which was dated prior to the time of settlement; and found for the plaintiff. The judge ruled that, on these facts, the auditor was not justified in finding for the plaintiff, and ordered a verdict for the defendant. *Held*, that the ruling was erroneous, and that the evidence should have been submitted to the jury. *Emerson* v. *Patch*, 541.

2. In an action for liquors sold and delivered, to which the defence was that the goods were sold to a third person, there was evidence that the defendant told the plaintiff's agent that he had bought a billiard-saloon, and was going to put the third person in to run the place; that the latter would want some liquors and he wished some might be sent, and ordered the liquors; that the third person in fact ran the place and appeared to do all the business there; there was also evidence, admitted under the defendant's exception, that afterwards the third person told the agent that the defendant had

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given him authority to buy stock for the saloon, and asked the agent to write at once to the plaintiff to hurry up the liquors previously ordered; that the agent thereupon wrote a letter containing a copy of the order which he had previously received from the defendant in which the defendant's name appeared as the person ordering the goods, and the letter was produced and admitted in evidence, although it had not been read by the third person. *Held*, that there was sufficient evidence that the third person was the agent of the defendant, and that the letter was admissible in evidence. *Tozier* v. *Crafts*, 480.

8. In an action against A. for goods sold and delivered, to which the defence was payment by the negotiable promissory note of B. and C., it appeared that the plaintiff took the partnership note of B. and C in payment. *Held*, that the declarations of one of the partners, to the effect that A. was a member of the firm, were admissible in evidence to show that the plaintiff took the note under a misapprehension, and that, if this were so, the action could be maintained. *Ib.*

GRANT.

See DEED; EASEMENT, 2.

GUARDIAN AND WARD.

See EVIDENCE, 7; JUDGMENT.

HANDWRITING.

See EVIDENCE, 24.

HOMICIDE.

By the law of this Commonwealth, suicide is deemed criminal as *malum in se*, and although an attempt to commit it is not punishable, yet a person who, in attempting to commit it, accidentally kills another who is trying to prevent its accomplishment, is guilty of criminal homicide. *Commonwealth* v. *Mink*, 422.

HUSBAND AND WIFE.

See MARRIED WOMAN; PROMISSORY NOTE, 5; VERDICT, 1.

INDICTMENT.

In an indictment alleging that "the jurors for the Commonwealth of Massachusetts" present that the defendant at a certain trial before "a certain jury of the country" falsely testified upon a material question, "and so the jurors aforesaid" do say that the defendant committed perjury, the words "the jurors aforesaid" refer to "the jurors of the Commonwealth of Massachusetts," and not to "a certain jury of the country." *Commonwealth* v *Kelly*, 417.

See COMPLAINT, 3; EXCEPTIONS, 4; INTOXICATING LIQUORS, 6; TRIAL, 1

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INFANT.

A firm, of which an infant was a member, gave certain checks in payment for goods, and the infant supposed, when he became of age and until after the firm's dissolution, that the checks, which were duly protested for non-payment, were paid. At the dissolution, which was seven weeks after the infant became of age, during which time he drew money from the firm for his personal use, some of the goods were unsold, and his partners agreed with him to assume and pay all the firm's debts. *Held*, that the above facts would not justify a finding that there was a ratification by the infant, after he came of age, of his promise to pay the checks. *Tobey* v. *Wood*, 88.

INFORMATION.

See CHARITY; JUDGE, 2.

INSURANCE.

I. *Life.*

1. A policy of life insurance, purporting to be issued by a mutual insurance company, in consideration of a certain sum "paid," and of a like sum to be paid annually, contained the following conditions: "That if said assured shall neglect to pay the annual premiums at the time and in the manner prescribed, this policy shall become forfeited and void except as provided in the St. of 1861, *c.* 186. That this policy, and any amount which may become due for loss thereon, is assigned and hypothecated to said company, and they have a lien thereon to secure the payment of any premiums or parts thereof on which credit shall have been given, and of any notes or securities given or to be given to said company, and, upon non-payment of such notes or securities after the payment of the same shall have become due and have been demanded, said policy shall become forfeited and void. That this policy shall not take effect until the premium is paid." The policy was delivered to the insured, and the company gave him a receipt for the full amount of the first premium. Only half of this premium was in fact paid in cash, and at the same time the insured delivered to the company a memorandum by the terms of which he agreed, in consideration of the company deferring the payment of one half the premium for six months, to pay said sum with interest at the expiration of that time, and that, if not so paid, the insurance should cease and the policy become void. *Held*, that the policy was forfeited by failure to pay this note when due, and that the amount of this note must be deducted from the net value of the policy in determining the premium of temporary insurance under the St. of 1861, *c.* 186. *Bigelow* v. *State Assurance Association*, 113.

II. *Fire.*

2. In an action upon an oral contract of insurance, there was evidence that the plaintiff made an application for insurance to the defendant's local

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agent; that the local agent agreed to place at once a certain amount at a certain rate upon the risk and to bind it, and immediately made a memorandum to that effect in what was called his "binding-book;" that the policy was not to issue until a special agent of the defendant had inspected and approved of the risk, which was specially hazardous; that the local agent had authority in writing "to receive proposals for insurance," and was entrusted with blank policies signed by the defendant's president and secretary, which he was accustomed to fill out and deliver without consultation with them; that he had frequently, with their knowledge and consent, issued policies upon risks of the same class without submitting the same for their previous approval; and that there was a usage among insurance companies and their agents to bind the companies by preliminary oral agreements until policies could conveniently be issued. *Held*, that a jury would be warranted in finding that the local agent made an oral agreement of insurance within the apparent scope of his authority. *Putnam* v. *Home Ins. Co.* 324.

3. A policy of insurance described the building insured as a "frame dwelling-house," and provided that the policy should be void if the assured should appropriate the building to other uses than those mentioned in the policy. In an action on the policy, the answer alleged that the plaintiff used and occupied the building at the time he procured the policy and afterwards as a boarding-house and hotel. *Held*, that evidence of such change in occupation subsequent to the date of the policy was not admissible under the answer. *Peirce* v. *Cohasset Ins. Co.* 572.

4. Household furniture belonging to A. was sold to B. and a receipted bill of parcels given, signed by A. B., while the furniture was in the possession of A., in a house belonging to C., wrote on the bill of parcels, "I hereby transfer and sell all of the above furniture to C.," signed the writing, and delivered it to C." who went to the house and saw the property; and it was orally agreed that the property should remain in the custody of A., but that possession of it was given to and received by C., and that the legal title was to be in him. C. took out a policy of insurance on the property, against loss by fire, in which it was described as "his household furniture," in a house the location of which was described. During the term of the policy, and while the furniture remained in the house, a loss occurred. *Held*, that C. had an insurable interest in the furniture; that it was properly described; and that there was no material concealment or misrepresentation, in failing to state that the property was in a house occupied by A. *Held*, *also*, that statements made by C. under oath, in proofs of loss, "that the property belonged exclusively to the assured, and that no other person had any interest therein," and that "the articles named belonged to and were in the possession of the assured at the time of the fire," did not amount to fraud or false swearing, within a clause in the policy requiring proofs of loss, and providing that any fraud or false swearing should forfeit all claim under the policy. *Little* v. *Phœnix Ins. Co.* 380.

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5. A mistake of fact or honest misstatement under oath, on the part of an assured, does not amount to fraud or false swearing, within the meaning of those words in a policy of fire insurance. *Little* v. *Phœnix Ins. Co.* 380.

6. A policy of insurance against fire was issued by a foreign stock company, through its agents in this Commonwealth, on household furniture. The policy provided that, in case of loss, the insured should "forthwith" give notice thereof to the company, and, "as soon after as possible," make formal proof of loss, after which the company was to have sixty days in which to pay the loss; and that no action should be brought on the policy unless begun within twelve months of the loss. In an action begun on September 3, 1875, there was evidence that the loss happened on January 26, 1874; that the insured gave notice forthwith of the loss to the agents from whom he procured the policy, and who referred him to one P. as the adjuster for the company, to whom he gave a memorandum of the furniture destroyed; that P. made no objection to its form, and both acted on it as sufficient, the only difference between them being as to the amount of the loss; that, in July, the agents who had issued the policy ceased to act, and the negotiations were continued with one T., as general agent of the company, who testified, for the defendant, "that he succeeded P. in the business;" that he received the memorandum from P. in September, and made no objection to its sufficiency; that the insured, after this, not finding T. at his office, though he called several times, went to the state where the company had its office, and saw the vice-president, who referred him to T.; that T. encouraged him to believe that the case would be settled, and promised to meet him; that, on November 25, the insured wrote to the company about the matter, and stated that T. had promised to see him, but had not done so; that the secretary of the company replied that T. had been kept busy at the office, and that the company was not aware that any proof of loss had yet been furnished the company; that this was the first intimation the insured had that any objection was taken to the proofs of loss; that in December he wrote to T., and expressed a wish to see him soon, but received no reply; that no further communication was had until March 30, 1875, when the insured sent formal proofs of loss, and asked for an interview with T., and received a reply signed by T., with the words "general agent" added, in which he said that an interview would be useless, "as we cannot admit any liability." *Held*, that the evidence was sufficient to warrant the jury in finding that P. and T. acted as general agents, with the knowledge and approval of the company, having authority to settle the loss, and that they waived the formal preliminary proofs of loss required by the policy; and also in finding that the agents of the company delayed a settlement upon the pretence that they were seeking to adjust the loss, and, while admitting the liability of the company, intended to prolong the negotiation and induce the plaintiff to forego his action for twelve months; and that they wilfully and in bad faith misled him in this respect, and prevented him from so bringing his action; and that, this being so, the action could be maintained. *Ib.*

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III. *Marine.*

7. If an insurer refuses to accept an abandonment of a stranded vessel, but takes possession for the purpose of getting her off, repairing and restoring her to the owner, and, in good faith and with reasonable diligence, proceeds to make what he deems full repairs, at a cost less than half her value when repaired, after making the usual deductions, and tenders her in this condition to her owner, who refuses to receive her, but makes no objections to the sufficiency of the repairs, and points out no deficiencies, there is no acceptance of the abandonment, and no constructive total loss of the vessel, although it afterwards appears that the repairs were not fully made. *Marmaud* v. *Melledge*, 173.

8. A vessel was chartered to proceed to a certain port "with all convenient speed," and there take a cargo on board and transport it to another port. Her owner effected insurance on the freight. The vessel, while on her way to the port of lading, was stranded and abandoned to her underwriters, and an abandonment was also made to the underwriters on the freight. The underwriters on the vessel got her off, repaired her at a cost less than half her value, and tendered her to the owner, who refused to receive her. After the abandonment, the owner refused to have anything to do with the vessel, and wrote to the charterer that the vessel was a wreck and in the hands of the underwriters, and that he could not proceed as per charter party. *Held*, that, there being no total loss of the vessel, and the owner having voluntarily abandoned the charter party, he was not entitled to recover the insurance on freight. *Ib.*

9. A policy of marine insurance, insuring $3000 on freight valued at $15,000, contained the following clause: "In case of general average, this company is not liable to contribute on a sum greater than the amount herein insured." During the voyage, the vessel met with a general average loss which was adjusted at the port of destination, where the owner received his entire freight, namely, $20,564.34. The contributory value of the freight, after making the customary deductions, was $13,832.86, and the owner paid $4276 in behalf of the freight. *Held*, that the insurer on freight was liable only for $623.79, being a sum bearing the same proportion to the whole amount contributed by the freight which the sum insured bore to the whole freight earned. *Brewer* v. *American Ins. Co.* 78.

INTOXICATING LIQUORS.

1. Since the repeal of the St. of 1869, *c.* 415, § 63, an action may be maintained to recover the price of intoxicating liquors, sold in another state, while that statute was in force, by a person who had reasonable cause to believe that the buyer intended to bring them into this Commonwealth to be here kept or sold in violation of law. *Lindsey* v. *Stone*, 332.

2. At the trial of a complaint for keeping intoxicating liquors on a certain day with intent to sell the same, in violation of law, evidence of the condition of the room where the liquors were alleged to be kept, as to appointments and fixtures, at eight o'clock in the morning of the next day, is admissible. *Commonwealth* v. *Powers*, 244.

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3. On a complaint for keeping intoxicating liquors for sale in violation of law, evidence is admissible that the defendant kept a place of business consisting of two rooms, in one of which was a counter and a few cigars with tables and chairs; that the place was one of common resort; that on being arrested at that place he tried to conceal a bottle containing intoxicating liquor in his pocket, and afterwards, while under arrest, threw it away; and that, a few days after the arrest, he made an attempt to bribe the officer who arrested him. *Commonwealth* v. *Wallace*, 400.

4. On a complaint for keeping intoxicating liquors for sale in violation of law, evidence that the defendant kept a public bar, provided with tumblers and a dripping pan; that the bar was resorted to at all hours of the day and evening, and at times at very late hours of the night; and that, at the time of his arrest at his place of business, three pint bottles containing intoxicating liquors were found in his pockets, is competent and will authorize a jury in finding him guilty. *Commonwealth* v. *Wallace*, 401.

5. Evidence that two houses, in the first of which the defendant kept a saloon for the sale of intoxicating liquors, were in close proximity to each other; that the yard between the two was common to both, there being no division fence; that the porch of the second house, which opened into this yard, was only a few feet from the back door of the saloon; that there was a gate in the rear of the second house, used in common by the occupants of both houses, through which customers found their way to the saloon; that the defendant had often been seen to drive to this gate, and to carry jugs and demijohns through it into the yard; that two searches for liquors had been made, during the time in question, in the second house, at each of which liquors were found in jugs, bottles and demijohns, once in a locked closet in the porch and once in the cellar; that measures, tunnels and pumps, which had been recently used, were also found in the porch and cellar; that the owner and the occupant of the first floor of the second house had no knowledge of the liquors so found, and did not know that any were there; that the saloon, although fitted up and much used and resorted to for the illegal sale of intoxicating liquors, had many times been searched during the time in question and no liquors were found, except that on two occasions a very small quantity was found in bottles, on the person of the bar-tender; and that in the saloon were found tumblers, a drainer and a number of pint and quart flasks; will warrant a jury in finding that the second house was kept for the unlawful sale or unlawful keeping of intoxicating liquors. *Commonwealth* v. *McCluskey*, 401.

6. On an indictment on the Gen. Sts. *c.* 87, § 6, charging that a house was kept for the unlawful sale or unlawful keeping of intoxicating liquors, the same "being then and there a common nuisance," it is sufficient to prove that the liquors were kept in the house for sale, and the fact that they were so kept to be sold in another place is immaterial. *Ib.*

See ARREST; AUTREFOIS ACQUIT; COMPLAINT, 2, 3; EVIDENCE, 11; EXCEPTIONS, 4; SEARCH WARRANT; WITNESS.

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JUDGE.

1. A special justice of a police court is a "judge of any court of this Commonwealth (except the Court of Sessions)" within the eighth article of amendment of the Constitution, and therefore cannot at the same time have a seat in the House of Representatives. *Commonwealth* v. *Hawkes*, 525.

2. Such a judge, as the eighth article of amendment of the Constitution of the Commonwealth declares shall not have a seat in the House of Representatives, legally vacates his judicial office by accepting a seat in the House, and, if he continues to exercise the functions of a judge, may be ousted by an information in the nature of a *quo warranto*. *Ib.*

3. If a judge of a district court holds, at the same time, the office of mayor of a city within the district, the question whether he is disqualified to act as judge, by reason of incompatibility in the two offices, cannot be determined upon an appeal taken by a person whom he has tried and found guilty upon a complaint originally made returnable before him. *Commonwealth* v. *Taber*, 253.

See TRIAL, 2.

JUDGMENT.

Where the same person is guardian of an insane person, and, after his death, the administrator of his estate, the widow and children of the deceased may contest the guardian's account in the Probate Court, and, if dissatisfied with its decree, appeal therefrom; but, if no such appeal is taken from a decree of the Probate Court allowing his account and determining that certain notes were the guardian's private property, the matter is *res adjudicata* as between them and him, and cannot afterwards be reopened between the same persons upon their objections to his account as administrator, although only part of the notes had been collected by the guardian at the time of the settlement of his final account as such. *Cummings* v. *Cummings*, 270.

See BANKRUPT, 2; CORPORATION, 4; EQUITY, 2; ERROR; REVIEW.

JURISDICTION.

The "debt or damages demanded," by which the St. of 1875, *c.* 106, § 1, regulates the jurisdiction of the municipal courts of Boston in civil actions, is the *ad damnum* in the writ, without regard to the amount claimed in the declaration or proved at the trial. *Clay* v. *Barlow*, 378.

JURY.

See INDICTMENT.

LAND DAMAGES.

See WATERWORKS.

LANDLORD AND TENANT.

See LEASE.

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LARCENY.

1 A thief, who steals goods in another state and sends them into this Commonwealth by an agent, not an accomplice in the theft, may be indicted for larceny here. *Commonwealth* v. *White*, 430.

2 On an indictment for the larceny of certain wool alleged to belong to A., there was evidence that A. had certain wool stored in a building, of which a portion, exceeding in quantity that set forth in the indictment, was missing; that the defendant admitted that he took the wool, described in the indictment, from a hall adjoining the rooms in which A.'s wool was stored, but said that he bought it of the occupant of the hall, which the latter denied; that the defendant attempted to procure a witness to testify falsely that the occupant of the hall hired him to remove the wool; that the defendant hired a man and wagon to take the wool, but remained away while it was being loaded, and joined the wagon soon after it had started with its load; that the hall was not in constant use, and there was opportunity to remove the wool from the storeroom and repack it in smaller bags, as when taken. It did not appear that there was any wool other than A.'s stored in the building at the time of the alleged larceny; and there was no evidence that other wool, stolen at about the same time from a wharf in the neighborhood, had been placed in the hall or building. *Held*, that the evidence would warrant a finding that the wool in question was the property of A. *Commonwealth* v. *Carroll*, 411.

3. On the trial of an indictment for larceny, there was evidence that the property had been entrusted to the custody of the defendant; that he had sold it and absconded with the proceeds of the sale. The evidence was conflicting on the question whether the defendant had authority from the owner of the property to make the sale. The judge instructed the jury that "if the defendant sold the property rightfully, or under an honest belief that he had such right, no wrongful appropriation or keeping of the money would warrant a verdict of guilty; that the fact, if proved, that the defendant absconded and kept the money might be considered by the jury as evidence bearing upon the question whether the taking and selling of the property was felonious." *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Hurd*, 438.

LAW AND FACT.

See FOREIGN LAW; WAY, 6.

LEASE.

Where the owner of land leases it to A., subject to a lease of part of the same to B., for a shorter term, A. "to collect rent from B. for so much of the term as has not elapsed," A. is entitled to the rent subsequently accruing under B.'s lease, and may sue for it in his own name. *Harmon* v. *Flanagan*, 288.

See BANKRUPT, 3; DEVISE AND LEGACY, 1; EVIDENCE, 7; FRAUDS, STATUTE OF, 1; MORTGAGE, 2; REMOVAL OF ACTION.

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LEGACY.

See DEVISE AND LEGACY.

LIEN.

See MECHANIC'S LIEN.

LIMITATIONS, STATUTE OF.

Under the Gen. Sts. *c.* 155, § 14, a payment of interest on a promissory note by the principal does not take the debt out of the statute of limitations as against a surety. *Faulkner* v. *Bailey*, 588.

See EVIDENCE, 24; EXECUTOR AND ADMINISTRATOR.

MANDAMUS.

1. If the city council of a city, authorized by statute to maintain a ferry at such rates of toll as the board of aldermen may from time to time determine, orders that the ferry be run free of toll on and after a future day, this court, on an application made before that day arrives, may, by a writ of mandamus to the city council, compel the city to continue to collect the tolls established by the board of aldermen. *Attorney General* v. *Boston*, 460.
2. If the city council of a city, authorized by law to maintain a toll ferry, illegally orders the ferry to be run free of toll, a writ of mandamus may be demanded by the attorney general. *Ib.*

MARRIED WOMAN.

1. Where money is lent to a married woman, upon an agreement that it shall be applied to the use of her husband or his firm, she is not liable on a note given by her therefor prior to the St. of 1874, *c.* 184. *Nourse* v. *Henshaw*, 96.
2. Evidence that a firm was composed of the husband of a married woman, to whom money was lent, and of the son-in-law of the lender; that she was in no need of money except to assist her husband, and that the lender had no inducement to lend it except to aid the firm, which was in financial difficulty; that, during the negotiation, the question whether she ought to "sacrifice" her property for her husband's or the firm's benefit was discussed; that the money was handed to her, and she instantly, without counting it, handed it to her husband, who gave it immediately to his partner; and that the latter at once deposited it to the credit of the firm; will justify a finding that the money was lent upon an agreement that she should apply it to the use of her husband or his firm. *Ib.*

See PROMISSORY NOTE, 5; VERDICT, 1.

MASTER AND SERVANT.

1. In an action by a laborer against his employer to recover for personal injuries caused by the falling in of the sides of a sewer in which the laborer

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was at the time at work, there was evidence that the employer was a contractor for the construction of the sewer; that the laborer was at work at the time of the accident under the direction of a superintendent, who had charge of the work and was admitted to be skilful and competent, and who was to receive, as compensation for his services, one half the profits; and that, for the safety of the men, it was necessary, in some dangerous places where the soil was loose, to place planks properly braced to keep the sides from falling in; and that this was not done. The plaintiff also offered to show that the system of construction was unsafe and defective. There was no evidence that the employer failed to furnish sufficient or suitable material for the construction of the safeguards, or that he was chargeable with any specific personal neglect, or knew of the cause of the accident. *Held*, that the superintendent was a fellow servant of the laborer, and that the action could not be maintained. *Zeigler* v. *Day*, 152.

2. In an action by a workman against his employer, for personal injuries caused by the fall of a staging, upon which the plaintiff was at work as a mason erecting a mill, the evidence tended to show that the staging was erected by fellow workmen of the plaintiff, out of material furnished by the defendant; that the staging was insecure by reason of a small piece of defective timber, called a putlog, on which the floor of the staging rested, and which had been in use by the defendant about two years; that the material for the staging was lying on the ground in piles near the building, and, from the mass, persons, who were afterwards the fellow workmen of the plaintiff, selected such material as they wanted, including the putlog in question; that some of the workmen were journeymen whose trade it was to learn to build safe and proper staging, and that they superintended the erection of this staging. The judge instructed the jury that the plaintiff could not recover unless the jury were satisfied that the defendant did not exercise ordinary care in the selection of men and materials to erect the staging, and that such want of ordinary care caused the accident; and that, if the defendant was to furnish a staging as a completed structure, he was to use such care in so doing as any person of ordinary prudence would use in providing such a structure; and that, if he was only to furnish material, or to furnish this putlog as a manufacturer's utensil, he was to use ordinary care in so doing. The judge also, at the request of the defendant, further instructed the jury that if the defendant employed competent men to take charge of the erection of this building and of the necessary staging, and furnished suitable material for building the staging, out of which material a fellow workman, not under the superintendence of the defendant or his agent, selected a defective putlog which broke after the staging was erected, by which the plaintiff was injured, the defendant was not liable; and that the defendant was not liable if he used ordinary care and prudence in the selection of competent workmen and materials, from which the staging was made. *Held*, that the plaintiff had no ground of exception. *Colton* v. *Richards*, 484.

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MAXIMS.

Potior est conditio defendentis. See *Hannan* v. *Hannan*, 441, 443.
Qui facit per alium facit per se. See *Commonwealth* v. *White*, 430, 434.

MECHANIC'S LIEN.

1. Under the Gen. Sts. *c.* 150, § 1, no lien can be maintained for labor performed or furnished, under an entire contract, partly on the land described in a petition therefor, and partly on adjoining land. *Foster* v. *Cox*, 45.
2. On a petition to enforce a mechanic's lien for labor performed and materials furnished in erecting a building, it appeared that the building was erected in such a manner that, while its foundation was on the land described in the petition, the part above it projected about an inch over the land of an adjoining owner. *Held*, that, no excuse or explanation being shown for so building it, the lien could not be maintained. *McGuinness* v. *Boyle*, 570.

See Review.

MILL.

On a complaint under the mill act, objections that the respondent had a prescriptive right to maintain its dam and that there was no mill existing, to the description of the land in the complaint, and to the sufficiency of the service, must be pleaded in bar and decided by the court before the issuing of a warrant, and cannot be made for the first time after the return of the verdict of a sheriff's jury into court. *Hadley* v. *Citizens' Savings Institution*, 301.

See Action, 4, 5; Evidence. 17; Execution; Principal and Agent, 2; Verdict, 2; Watercourse.

MONEY HAD AND RECEIVED.

1. A. agreed in writing to buy and B. to sell a lot of land on a street, lying between land previously sold by B. and land of C., at a certain price per square foot. B. caused the land to be surveyed, and A., supposing the survey to be correct, paid the price agreed for the number of square feet ascertained by it. The deed to A. stated as the consideration a sum which was equal to the number of feet, multiplied by the price stated in the agreement; and purported to give with accuracy the length of all the lines with the number of square feet in the lot, and bounded it on one side by C.'s land. Whether the number of square feet conveyed was equal to or less than that stated in the deed, depended upon the question whether B. or C. owned a strip of land lying between lots admitted to be owned by them respectively, and which was conveyed in the deed from B. to A. *Held*, that if C. in fact owned the strip, an action for money had and received, to recover back part of the price paid, could be maintained, and that a bill in equity could not. *Pickman* v. *Trinity Church*, 1.
2. A., through fraud, obtained from B. a promissory note signed by B., and payable to the order of C., forged the indorsement of C. and got the note

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discounted at a bank. On the maturity of the note B. paid it to the bank. *Held*, that B. could maintain an action against the bank for money had and received, although the bank acted in good faith in taking the note. *Carpenter* v. *Northborough National Bank*, 66.

3. If a person pays a promissory note through mistake, supposing the signature upon the note to be his genuine signature, he may, on discovering it to be forged, maintain an action to recover back the money paid, if he is not guilty of laches whereby the situation of the other party is changed to his injury. *Welch* v. *Goodwin*, 71.

4. The situation of a person, to whom money is paid by mistake on a forged note, is not changed to his injury by the fact that, on payment, he transfers to the payer a mortgage which he received as collateral security for the note, and which, with the note, he took in good faith, supposing the note to be genuine, the mortgage having been given as security for another note, of which the forged note was a copy. *Ib.*

5. If a third mortgagee of land, which is subject also to a fourth mortgage sells, under a power of sale contained in his mortgage, the entire title in the land, with the assent of the prior mortgagees, for a sum sufficient to pay off all the four mortgages, the fourth mortgagee can maintain an action against him for money had and received. *Cook* v. *Basley*, 396.

See CONTRACT, 2.

MONEY PAID.

See SET-OFF.

MORTGAGE.

I. *Real Estate.*

1. An assignment, duly recorded, by the holder of a mortgage containing a power of sale, and made to secure two notes for $1000 and $2000, of "the said mortgage deed, the real estate thereby conveyed, so far as the same is security for said note of $1000, thereby secured," transfers the mortgage as security in the first place for the payment of the whole of the note of $1000, although the assignment contains no covenant of warranty. *Foley* v. *Rose*, 557.

2. A lessee of land became the owner of an undivided portion of it, and executed a mortgage of this undivided portion, reciting that a part of the premises was subject to a lease and that the leased premises were included in the description and in the mortgage. The mortgagee afterwards entered to foreclose. *Held*, that, even if the lease passed by the mortgage, the lessee had the right of possession against all persons except the mortgagee, until the expiration of three years from the entry, and could maintain an action of tort, for a trespass within that time, against a third person. *Martin* v. *Tobin*, 85.

3. A., for the purpose of enabling B. to raise money for him, made a promissory note payable to the order of B., and executed to him a mortgage of

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land, as security therefor, which was duly recorded. B., without A.'s knowledge or consent, and to secure his own debt, delivered the note unindorsed to C., and afterwards assigned the mortgage and a note, procured from A. by artifice, to D. for value. *Held*, that C. was not, in the absence of fraud on the part of D., entitled in equity to an assignment of the mortgage. *Blunt* v. *Norris*, 55.

4. A. made a promissory note payable to the order of B.. and executed to him a mortgage of land as security therefor, which was duly recorded. B. indorsed the note to C., and afterwards assigned the mortgage to D., and delivered to him another note similar in terms to the one described in the mortgage. Both C. and D. acted in good faith, and each paid a valuable consideration to B. *Held*, that C. was entitled in equity to an assignment of the mortgage from D. *Morris* v. *Bacon*, 58.

5. If one who holds, by an assignment duly recorded, a mortgage and a note indorsed in blank, purporting on its face to be secured by it, "the same being collateral to" a certain note, assigns the mortgage, and afterwards indorses the note for which it was collateral, retaining the mortgage note, to another, by an assignment in like words duly recorded, he conveys a title to the mortgage debt, except as against an innocent purchaser for value without notice; and one, to whom he subsequently passes the mortgage note and fraudulently assigns the mortgage upon a separate paper as collateral security for a loan, is not such a purchaser. *Strong* v. *Jackson*, 60.

6. The grantee of a mortgagor of land cannot, because of fraud practised by the mortgagee upon the mortgagor in obtaining the mortgage, maintain a bill in equity against an assignee of the mortgagee to restrain a sale of the mortgaged premises under a power in the mortgage, without paying the entire debt secured by the mortgage, although the mortgage was assigned to the defendant as security for a less amount. *Foster* v. *Wightman*, 100.

7. In a writ of entry brought by a mortgagee against the heirs of the mortgagor, to foreclose a mortgage of land, it is a good defence that the mortgage was given without consideration; and parol evidence is admissible to show that no debt ever existed between the parties to the mortgage. *Hannan* v. *Hannan*, 441.

8. A. executed a deed of mortgage of land containing the condition "that if, on demand, there shall be paid" $1000 on a certain promissory note, signed by A. as indorser, then the deed should be void. The note was signed by A.'s son as principal, and was for more than $1000, and was given on account of a defalcation of his, and upon the giving of which the son was taken back into the promisee's employ, upon an agreement that a part of his wages should be applied in payment of the debt, under which arrangement more than $1000 was received by the promisee out of the son's wages, leaving more than $1000 due on the note. *Held*, on a bill in equity by A. to redeem the mortgage, that the amount received from the son's wages was not to be credited to the mortgagee. *Popple* v. *Day*, 520.

See ACTION, 1; FIXTURE; MARRIED WOMAN; MONEY HAD AND RECEIVED, 4, 5.

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II. *Personal Property.*

9. A mortgage of personal property from A. to B. expressed to be "subject to prior mortgages" to a certain amount to C., the amount and terms of which are known to B., conveys only the right to redeem the property from C.'s mortgage, and, although recorded first, does not take precedence of C.'s mortgage. *Pecker* v. *Silsby*, 108.

10. A. sold and delivered to B. certain machinery for the manufacture of a patent machine, the license to manufacture which was to expire at a certain date, and took in payment a note, secured by a mortgage back upon the machinery and referring to an agreement of even date between the parties, by which A. was to retain in payment of the note a part of the price of such machines as B. should make for him. When the license expired a balance was due upon the note which B. failed to pay on demand. *Held*, that A. was entitled to foreclose the mortgage for the payment of the debt secured thereby. *Avery* v. *Bushnell*, 349.

MUNICIPAL COURT.

See JURISDICTION; REMOVAL OF ACTION.

MURDER.

See HOMICIDE.

NAME.

See COMPLAINT, 3.

NEGLIGENCE.

See ACTION, 2–4; CHECK; EVIDENCE, 3, 25; MASTER AND SERVANT; PLEADING, 3; WAY, 6.

NEW TRIAL.

1. A motion for a new trial is addressed to the discretion of the court, and no exception lies to its exercise. *Hadley* v. *Citizens' Savings Institution*, 301.

2. In a criminal case tried in the Superior Court, and in which exceptions alleged at the trial have been entered in and overruled by this court, and a rescript sent down accordingly, a motion for a new trial, on grounds not affecting the correctness of the decision upon the exceptions, cannot be made in this court. *Commonwealth* v. *Scott*, 418.

3. A bill of exceptions to the refusal of a judge to grant a new trial, asked for on the ground of newly discovered evidence, set forth the evidence at the trial and the new evidence, and stated that the judge decided that, upon this evidence, if proved, the verdict ought not to be set aside, and overruled the motion. *Held*, that no ground of exception appeared, and that the exceptions must be overruled with double costs. *Behan* v. *Williams*, 166.

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OFFICER.

See Autrefois Acquit; Estoppel; Judge; Search Warrant.

ORDINANCE.

See By-Law.

PARTITION.

See Flats.

PARTNERSHIP.

An agreement of dissolution of a partnership existing between A., B. and C. provided that A. should continue the business, paying B. and C. for their respective interests; that matters in dispute should be referred to arbitrators; and for an account of stock. This account was taken and certain goods, supposed to belong to a third party, were not included. In a subsequent dispute between A., B. and C., and this third party, a referee, to whom the matter was submitted, decided that a large portion of the goods in question belonged to the late firm. On a bill in equity brought by B. and C. to compel A. to account and to pay them their respective interests in these goods, the answer of A. alleged that he had paid them according to the account taken at the dissolution, and that all matters in dispute had been submitted to the arbitrators as provided, whose report was conclusive. The master, to whom the case was sent, found that the goods in question were not included in the original account, because they were supposed to belong to the third party, and that this matter was not submitted to the arbitrators. *Held*, that the account was not conclusive, and that B. and C. might show that the goods in question were the property of the firm; that the award of the arbitrators was not a bar to the suit; that A. could not prove under his answer that he was ready and willing to refer the claim to the arbitrators named in the articles; and that the award and testimony of the referee, that the ownership of the goods in question was in dispute before him and that he decided that they belonged to the firm, was admissible. *Evans* v. *Clapp*, 165.

See Evidence, 6; Goods sold and delivered, 3.

PATENT.

See Mortgage, 10.

PAYMENT.

1. By the law of this Commonwealth, the giving of the negotiable promissory note of a third person is evidence of payment of a preëxisting debt, and sufficient where there is nothing to defeat the inference or show that such was not the intention of the parties; and, in the absence of evidence to the contrary, the rule will be presumed to be the same in Maine. *Ely* v *James*, 36.

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2. In an action for the price of a cargo of coal, to which the defence was payment by the note of a third person, there was evidence that an offer for the coal to be delivered in Maine, at a certain price per ton, was made by the defendant in Massachusetts to an agent of the plaintiff, who did business in New York; that this offer was sent by the agent to the plaintiff, and accepted by him; and the coal was sent to Maine by a vessel hired by the plaintiff for the purpose, with an invoice, which stated the price per ton, less freight; that, on delivery of the coal, the defendant paid the freight and sent a promissory note of a third person in settlement for the price as stated in the invoice, and requested the return of the invoice receipted; that the plaintiff wrote on the invoice, "Received payment by note," signed it and returned it to the defendant; that the plaintiff got the note discounted, and, on failure of the maker to pay it at maturity, took it up and tendered it to the defendant, and, on the maker being adjudged a bankrupt, proved it against his estate, after this action was brought. There was also evidence that, at the time of making the offer, the agent agreed that payment might be made by the note of the third person, and that the plaintiff had previously sold a cargo of coal to the defendant, and had received the note of the same third person in payment. *Held*, that the conduct of the plaintiff, after receiving the order, was evidence of a ratification of the agent's acts, from which, in connection with the former transaction, previous authority in the agent to take the note of the third person in payment might be inferred. *Held, also*, that whether the plaintiff knew or did not know of the agreement of the agent to take the note of the third person, at the time the note was accepted by the plaintiff, was immaterial, if the plaintiff accepted without objection what he had reasonable ground to believe was the result of the agency. *Held, also*, that the judge was not bound to instruct the jury that the fact that the defendant paid the freight would authorize a finding that the coal was delivered to a carrier in New York, and that the contract was a New York contract. *Held, also*, that the evidence of the proof of the note in bankruptcy against the estate of the maker was competent as tending to show that the plaintiff treated the note as his own, and originally accepted it as payment. *Ely* v. *James*, 36.

See EVIDENCE, 16; GOODS SOLD AND DELIVERED, 3; LIMITATIONS, STATUTE OF; MORTGAGE, 8.

PERJURY.

See INDICTMENT.

PLEADING.

I. *Parties to Action.*

See ACTION, 1; LEASE; PRINCIPAL AND AGENT, 2; PROMISSORY NOTE, 3.

II. *Declaration.*

1. A declaration on an agreement within the statute of frauds need not allege that it was in writing. *Mullaly* v. *Holden*, 583.

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III. *Motion to dismiss.*

2. A writ described the cause of action as "in an action of contract or tort;" and the declaration contained a single count in contract. The Superior Court overruled a motion to dismiss, and the defendant appealed. *Held*, that, so far as the objection related to the writ, the decision, by the Gen. Sts. *c.* 115, § 7, was final; and that, so far as it related to the declaration, it could only be taken by demurrer. *Clay* v. *Barlow*, 378.

See EXCEPTIONS, 3.

IV. *Answer.*

3. In an action on an account annexed for services, if the answer contains a general denial, the defendant may introduce evidence of the plaintiff's negligence and want of skill. *Caverly* v. *McOwen*, 574.

See INSURANCE, 3; WRIT OF ENTRY.

POLICE COURT.

Where terms of a police court are by law to be held daily for the transaction of criminal business, and on the first and third Wednesday of each month for civil business, and the record in a criminal case shows that it was heard and adjudged in that court on the second Wednesday of a month, but fails to set forth that the proceedings were had "at a criminal term" of the court, it will be presumed that the court was then engaged in the transaction of criminal business, and a motion in arrest of judgment must be overruled. *Commonwealth* v. *Brown*, 410.

See JUDGE, 1; JURISDICTION.

POOR DEBTOR.

1. If, under the Gen. Sts. *c.* 124, § 13, notice of an intention to take the poor debtor's oath is served by leaving a copy at the last and usual place of abode of the officer making the arrest, not less than twenty-four hours, in addition to the time allowed for travel, are, under the St. of 1861, *c.* 112, to be allowed the officer before the time appointed for the examination. *Central National Bank* v. *O'Connor*, 52.

2. A poor debtor duly presented himself for examination at the time and place appointed by a recognizance entered into under the Gen. Sts. *c.* 124, § 17. Before the expiration of the hour the creditor came to examine him, and the question arising whether it was not too late, the oath having been administered, the debtor, at the suggestion of the magistrate, left the place to see his counsel, and shortly returned. *Held*, that the debtor must make known to the magistrate that he had returned for examination, unless the creditor knew it or waived the right; and that, the debtor having been permitted to show that he returned in consequence of his counsel's advice, evidence of what the advice was was inadmissible. *Cook* v. *Thayer*, 333.

3. Charges of fraud under the Gen. Sts. *c.* 124, §§ 31–34, against a person applying to take the oath for the relief of poor debtors, are in the nature of

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civil proceedings, and need not be proved beyond a reasonable doubt; and the debtor and his wife may, under the St. of 1870, *c.* 393, be called as witnesses by the creditor. *Anderson* v. *Edwards*, 273.

See EVIDENCE, 12.

PRINCIPAL AND AGENT.

1. An agent of an undisclosed principal may be treated as the principal. *Welch* v. *Goodwin*, 71.

2. An agent, who merely carries on a mill for the owner's benefit, is not liable for its dam, a permanent structure, being maintained at too great a height, whereby the water is set back to the injury of another mill-owner. *Brown Paper Co.* v. *Dean*, 267.

3. B., a broker, advised A. to sell certain unregistered bonds and buy certain other bonds. A., in reply, by letter, said, "I am most anxious to get my money in registered bonds," authorized B. to sell the bonds then held by B. for him, "and invest the amount in the best paying and surest bonds that you know of." "As these bonds are all I possess, I am naturally always anxious about them, for the reason that, if lost or stolen, I could recover nothing. You will please invest the results of the sale in the I. bonds, [the ones recommended,] or any sure road." "I want registered bonds of which I will have no trouble in drawing the interest." "I shall be under many obligations if you will kindly make such sale and purchases of bonds as your good sense dictates." It was agreed that the bonds referred to by B. were first-mortgage bonds. B. in fact bought some first-mortgage and some second-mortgage bonds, all of which were unregistered. *Held*, that, if he acted in good faith, it was within the scope of the authority conferred upon him by the letter of A. *Matthews* v. *Fuller*, 446.

See CHECK; CITY, 8; EVIDENCE, 16; EXCEPTIONS, 12; GOODS SOLD AND DELIVERED, 1, 2; INSURANCE, 2, 6; PAYMENT.

PRINCIPAL AND SURETY.

See BOND, 2; LIMITATIONS, STATUTE OF.

PROBATE COURT.

See APPEAL; DEVISE AND LEGACY, 2; EXCEPTIONS, 2; JUDGMENT WIDOW.

PROMISSORY NOTE.

1. An instrument in the form of a promissory note, beginning, "We as trustees but not individually promise to pay," and signed "A., B. and C., trustees," purported on its face to be secured by mortgage of real estate. A., B. and C. were trustees of a land association, and purchased of the promisee a parcel of land, the deed of which ran to them as trustees of the association, and set forth their powers. They mortgaged the land to the grantor, and gave the above instrument, secured by the mortgage, in part

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payment of the purchase money. *Held*, in an action against the makers of the instrument, by an indorsee, who took it after maturity, that they were not personally liable thereon. *Shoe & Leather National Bank* v. *Dix*, 148.

2. It is a good consideration for a promissory note that the promisor gave it at the request and for the benefit of his son, who was in the employ of the promisee, to be applied by the latter towards the payment of a defalcation of the son, the note being so credited to the son on the books of the promisee. *Popple* v. *Day*, 520.

3. In an action on a promissory note by the administrator of the payee there was evidence that, on the death of the payee, the note, in a division of the personal property made before the appointment of the administrator, fell to a daughter, who by an agent demanded of the principal maker payment of the note; that the maker replied that it was not convenient for him to pay it but agreed to pay interest at eight per cent.; that the agent thereupon wrote the words "at eight per cent." on the note in the presence and with the assent of the maker; that a surety on the note, when told of the maker's agreement, after his death, and when shown the note so altered, paid the interest at eight per cent. *Held*, that the legal title to the note was in the administrator, and that he could maintain an action upon it. *Held*, *also*, that the evidence would warrant the jury in finding that both the maker and the surety assented to and ratified the note in its altered form, and thereby agreed to pay the same to the lawful holder for the sufficient consideration of an agreement to forbear, and an actual forbearance, by those who apparently had the actual control of the note and the equitable interest therein. *Prouty* v. *Wilson*, 297.

4 The alteration of a promissory note by one of the makers, by increasing the amount for which it was made, by the insertion of words and figures in blank spaces left in the printed form on which it was written, avoids the note as to such makers as do not consent thereto, even in the hands of a *bonâ fide* holder for a valuable consideration. *Greenfield Savings Bank* v. *Stowell*, 196.

5. If a promissory note, not negotiable, is given to a married woman by a third person in consideration of her husband's giving up to him a like note, and she transfers the note, with her husband's consent, to a creditor of his, in fraud of other creditors, the maker, in an action upon it in her name, cannot take advantage of that fact. *Harding* v. *Colon*, 299.

See CONTRACT, 3; EVIDENCE, 24; GOODS SOLD AND DELIVERED, 3; LIMITATIONS, STATUTE OF; MARRIED WOMAN; MONEY HAD AND RECEIVED, 2–4; MORTGAGE, 3–5, 8, 10; PAYMENT; STOPPAGE IN TRANSITU.

RAILROAD.

Under the St. of Missouri of December 10, 1855, § 18, providing that "after the Hannibal and St. Joseph Railroad shall be completed, equipped and in operation, said road shall be required to pay into the treasury of the state

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the surplus proceeds of all land sales, or such other securities as may be provided by the company, in a deed of trust or otherwise, in a place to be adopted by said company, to raise funds to complete the road," only so much of such proceeds is to be paid to the state as remains after deducting the amount of all expenses and obligations lawfully incurred by the corporation in completing, equipping and putting in operation its railroad, including sums advanced by the corporation to trustees for expenses of the management, surveying and disposing of lands granted by Congress and included in deeds of trust, and for taxes thereon, and to satisfy reclamations on bad titles and other incidental expenses; sums paid, either in money or in stock, to discharge the bonds issued by the corporation, and secured by deeds of trust, and the interest on such bonds; and sums paid and obligations incurred to other parties than the state to raise money to complete the road and not secured by mortgage thereof. *Hannibal & St. Joseph Railroad* v. *Bartlett*, 15.

See CORPORATION, 5.

RATIFICATION.

See EXCEPTIONS, 12; INFANT: PAYMENT, 2; PROMISSORY NOTE, 3; STOPPAGE IN TRANSITU.

RECEIVER.

See TAX, 3.

RECEIVING STOLEN GOODS.

1. On an indictment for receiving stolen bonds, the property of one S., it appeared that the bonds were stolen from S. in another state by some person unknown, and were afterwards brought into this Commonwealth by a person from whom the defendant received them in Boston. The defendant requested the presiding judge to instruct the jury that, in order to convict, "the jury must be satisfied that the defendant received the bonds in this state from the person who actually stole them from the said S." The judge refused this request, and instructed the jury that "it is not necessary that the person who actually committed the theft should bring the bonds into this Commonwealth; but if any one acting for and in behalf of the thief, or aiding such thief by receiving, having or holding the same after the actual theft, and knowing that they were stolen, brings them into this Commonwealth, and the defendant received the bonds in the county of Suffolk from any such person, knowing that they were stolen, and this is proved beyond a reasonable doubt, the jury must convict." No question was raised as to the unlawful intent of the defendant, and a bill of exceptions, allowed by the judge, stated that "upon other branches of the case instructions were given to which no exceptions were taken." *Held*, that this instruction, by the fair construction of it, presented the case of bonds being brought into this Commonwealth by some person acting for the thief as his

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agent and not of a person, who, having bought them in another state, brings them here on his own account. *Held*, *also*, that it was to be presumed that the judge instructed the jury that the words "knowing that they were stolen" imported a guilty knowledge. *Commonwealth* v. *White*, 430.

2. On an indictment for receiving "three bonds of the United States, each of the value of ten thousand dollars, of the property" of one S., it appeared that the bonds were, after they were stolen, and before they were received by the defendant, fraudulently altered by erasing the name of S. and inserting the name of C.; the verdict was "guilty of receiving two bonds." *Held*, that the fraudulent alteration did not take away from them the character of bonds of the United States or deprive S. of his ownership in them. *Ib.*

See EVIDENCE, 28.

RECOGNIZANCE.

See POOR DEBTOR, 1, 2.

RECORD.

See POLICE COURT.

REMOVAL OF ACTION.

In an action of tort for breaking and entering the plaintiff's close, the question whether a lease, under which the plaintiff claims to be in possession, has been terminated, does not so involve the title to real estate that under the Gen. Sts. *c.* 120, § 18, the case may be removed at the request of either party from a municipal court to the Superior Court. *Martin* v. *Tobin*, 85

RENT.

See LEASE.

REPEAL.

See STATUTE, 1.

REPORT.

In a case of divorce or alimony, a question of fact cannot be reserved on report for the full court. *Stuart* v. *Stuart*, 370.

RETURN.

See ESTOPPEL.

REVIEW.

A decree establishing a mechanic's lien on a building and land, and ordering a sale of the same to satisfy the lien, upon a petition, inserted in a writ, under the Gen. Sts. *c.* 150, may be the subject of a writ of review, under the Gen. Sts. *c.* 146, or may be vacated, and the case brought forward on the docket for trial, under the St. of 1875, *c.* 33. *Hubon* v. *Bousley*, 368.

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SALE.

In replevin of whiskey, brought by A. against C., there was evidence that A. sold the goods in Cincinnati to B., who did business in Boston; that, by the terms of the agreement, the whiskey was to be delivered and regauged on the cars at Cincinnati, and, on receipt of an invoice of the whiskey, B. was to send to A. at New York his promissory note for the price, on three months' time, dated at Cincinnati as of the date of the delivery on the cars there; that the whiskey was put on the cars, and an invoice and a form of a note, dated at Cincinnati, on ninety days, were sent to B.; that B. did not sign this note, but pledged the goods to C. for a valuable consideration, failed in business, and two days afterwards sent a note to A. in New York, dated at Boston, and payable three months after date; that A. replevied the whiskey in Boston on the day the note arrived in New York, and two days afterwards tendered the note to B. in Boston, who refused to receive it. *Held*, that the evidence would warrant the jury in finding that the sale was upon a condition which was broken, and that there had been no waiver of the condition; and that, if so, B. acquired no title to the goods which he could transfer to C. *Armour* v. *Pecker*, 143.

See EVIDENCE, 20; FRAUDS, STATUTE OF, 2.

SAVINGS BANK.

A depositor in a savings bank, one of whose by-laws, contained in his deposit book, provides that, "as the officers of the institution may be unable to identify every depositor, the institution will not be responsible for any loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or part, on presentation," cannot maintain an action against the bank for an amount which, in good faith and without notice that the book had been stolen, it paid to a person who, fraudulently personating the depositor, presented the book and obtained the amount. *Goldrick* v. *Bristol County Savings Bank*, 320.

See TAX, 3.

SCHOOL.

If a person employed by the school committee of a town to teach for a fixed time, at a stated salary, is, before the expiration of that time, dismissed by the school committee, under the Gen. Sts. *c.* 38, § 25, he cannot maintain an action against the town for compensation for the remainder of the time. *Wood* v. *Medfield*, 545.

See CHARITY.

SEAMAN.

See SHIP.

SEARCH WARRANT.

An officer, acting under a warrant authorizing him to enter a building described as occupied by A., but in fact occupied by A. and B. in separate

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tenements, and seize and remove liquors kept there by A. for sale in violation of law, has no right to enter and search a closet which is a part of B.'s tenement, and is not used by A. as a place of keeping liquors, although he believes that the closet is in A.'s occupation; and B. may resist his entry, using reasonable force. *Commonwealth* v. *Newton*, 420.

SEASHORE.

See DEED; EASEMENT, 2; FLATS; STATUTE, 2.

SET-OFF.

Under the Gen. Sts. *c.* 130, § 3, a demand for money paid cannot be set off, unless it is for a sum that is liquidated, or one that may be ascertained by calculation. *Taft* v. *Larkin*, 598.

SHIP.

A seaman may maintain an action against a master of a vessel for his wages, by proof that he shipped at a fixed rate of wages per month, on the vessel of which the defendant was at the time master, and served until discharged by him, although there is no other evidence of a contract made by the master with the seaman. *Temple* v. *Turner*, 125.

See STOPPAGE IN TRANSITU.

SLANDER.

A communication, otherwise slanderous, is protected as privileged, if made in good faith in the prosecution of an inquiry regarding a crime that has been committed, and for the purpose of detecting and punishing the criminal. *Eames* v. *Whittaker*, 342.

SOLDIER.

See TOWN.

SPECIFIC PERFORMANCE.

A. agreed in writing with B. that if B. would buy certain shares in a corporation held by C., the company should employ him at a certain yearly salary; that if the company should fail or refuse to give him employment, A. would purchase the stock of him at a fair price; that if the parties could not agree as to what was a fair price, the same should be determined by arbitrators, whose decision should be binding. *Held*, that, even if the agreement was not void as against public policy, a bill in equity, by B. against A., for specific performance of the agreement, would not lie. *Noyes* v. *Marsh*, 286.

STATUTE.

1 The rules, relating to the construction of repealing statutes, enacted by the St. of 1869, *c.* 410, are to be deemed part of every repealing statute since passed, as much as if expressly inserted therein, unless the later statute clearly manifests a different intention. *Commonwealth* v. *Desmond*, 407.

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2. After a dispute of some years' duration between a town and the proprietors of common lands therein, about the rights of taking seaweed from the shores, the Legislature, upon the petition of the proprietors and with the consent of the town, incorporated the proprietors by an act which defined the bounds of their lands and reserved to the town "the privilege of the shores." For several years before and for twenty-six years after the passage of this act, the town let to various persons the right to take seaweed, sand, gravel and stones from the shores or beaches, and used such sand and gravel to repair its highways, and during that period it was not interfered with by the proprietors. *Held*, that the town's "privilege of the shores" included the right to take sand and gravel to repair its highways, if the beach would not be materially affected thereby. *Ripley* v. *Knight*, 513.

See BETTERMENT, 1; INTOXICATING LIQUORS, 1; WATERWORKS; WAY, 4.

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STOPPAGE IN TRANSITU.

A. sold goods to B., to be paid for upon their delivery, either in cash or in the notes of B. The goods were shipped on a vessel under a bill of lading by which they were to be delivered to B. on his paying the freight. Before the vessel arrived, B.'s notes were protested because of his inability to pay them in the usual course of business, and an agent of A., having heard that B. had failed, sent a person to stop the goods *in transitu*. This person, whose acts were subsequently ratified by A., before B. had paid or tendered the freight, or come into possession of the goods, but, after they had been attached by a creditor of B., demanded the goods of the master of the vessel, and forbade his delivering them to B. *Held*, that A. had seasonably exercised the right of stopping the goods *in transitu*. *Durgy Cement & Umber Co.* v. *O'Brien*, 12.

SUICIDE.

See HOMICIDE.

SUPERIOR COURT.

See REMOVAL OF ACTION.

SUPREME JUDICIAL COURT.

See EXCEPTIONS, 2; NEW TRIAL, 2; REPORT.

SURVIVORSHIP.

See ACTION, 5.

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TAX.

1. The St. of 1872, *c.* 321, relating to the collection of taxes upon bank shares, did not apply to shares belonging to the estates of deceased persons. *Revere* v. *Boston*, 375.

2. A bill in equity cannot be maintained against the trustees of personal property, placed in their hands as an accumulating fund for the future benefit of the heirs of a testator, for a tax assessed under the Gen. Sts. *c.* 11, § 12, *cl.* 6, to such heirs, although the heirs are not pecuniarily responsible. *Freestown* v. *Fish*, 355.

3. The tax, imposed on savings banks, by the Sts. of 1862, *c.* 224, and 1868, *c.* 315, to be assessed annually on each bank, one half on the average amount of deposits for the six months preceding the first day of May, and the other half on the average amount for the six months preceding the first day of November, is an excise tax upon the value of the franchise of a bank on those days; and if on either day such bank is in the hands of receivers, and perpetually enjoined from doing business by a decree of this court, it is not liable to pay any part of the tax assessed on that day, although it has transacted business during a part of the six months preceding. *Commonwealth* v. *Lancaster Savings Bank*, 493.

See CONTRACT, 2.

TENANT IN COMMON.

See EXCEPTIONS, 13.

TIME.

See BANKRUPT, 3; EXCEPTIONS, 1.

TOWN.

Under the St. of 1866, *c.* 172, providing state aid for certain persons, and, in § 11, that towns and cities may raise and apply money for such purpose, and that "all persons entitled to aid," "who do not apply for the same within three months from the passage hereof, shall not receive said aid prior to the date of their application," a vote of a town to pay such a person "back state aid," upon an application filed after the expiration of the three months, is illegal and void. *Cusick* v. *Brookline*, 91.

See BY-LAW, 1; SCHOOL; STATUTE, 2, WAY, 2–6.

TRESPASS.

See MORTGAGE, 26.

TRIAL.

1. If the defendant in a criminal case does not testify, the prosecuting attorney cannot be allowed to comment to the jury on the reasons given by the defendant's counsel for his not testifying, nor to give other reasons which the government contended really existed for his not testifying. *Commonwealth* v. *Scott*, 239.

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3. An instruction that certain evidence was sufficient to authorize the jury to find a certain fact, made in response to a request by a party for a ruling that it was insufficient, is not in violation of the Gen. Sts. *c.* 115, § 5, prohibiting courts from charging juries with respect to matters of fact. *Commonwealth* v. *Brigham*, 248.

See ATTORNEY AND COUNSEL, 2, 3; EVIDENCE, 19; EXCEPTIONS, 4, 11; VERDICT.

TRUST AND TRUSTEE.

See CHARITY; DEVISE AND LEGACY, 2, 6; TAX, 2.

TRUSTEE PROCESS.

1. Where A. executed to B. an assignment of wages due and to become due for a certain term from C., as security for goods already furnished and to be furnished by B. from time to time during the term, but to no specified amount, the excess due from C. at any time, over and above the amount then due from A. to B., may, under the St. of 1865, *c.* 43, § 1, be held upon trustee process in favor of a creditor of A. *Warren* v. *Sullivan*, 283.

2. If, in a trustee process, the trustee admits funds in his hands, due as wages to the principal defendant, and an adverse claimant proves a valid assignment of the wages as security for a debt, the trustee is chargeable on his answer for the excess in his hands over the amount of the debt due the claimant. *Giles* v. *Ash*, 353.

3. In a trustee process, an adverse claimant of the funds in the hands of the trustee is not allowed to show that there were no goods, effects or credits of the defendant in the hands of the trustee, at the time of service upon him. *Clark* v. *Gardner*, 358.

See COSTS.

ULTRA VIRES.

See CORPORATION, 2.

VERDICT.

In an action against a husband and wife, the verdict of the jury in the title of the case omitted the words "and wife." *Held*, that it was within the discretion of the judge who presided at the trial to allow the jury, after they had separated, to amend their verdict by adding these words. *Riley* v. *Williams*, 506.

2. In an action against a mill-owner to recover damages caused by his maintaining his dam at too great a height, whereby the water was set back, the jury returned a verdict with nominal damages for the plaintiff, and a direction that the defendant should reduce his dam to a certain level, which latter the judge ordered to be erased, and, several jurors dissenting from the verdict thus amended, directed them to retire, and, if they agreed, return a sealed verdict in the morning. The jury then returned a verdict with sub-

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stantial damages for the plaintiff. *Held*, that the defendant had no ground of exception. *Brown* v. *Dean*, 254.

See EXCEPTIONS, 11.

WAGES.

See ASSIGNMENT; TRUSTEE PROCESS, 1, 2.

WAIVER.

See ARBITRAMENT AND AWARD, 2; INSURANCE, 6; POOR DEBTOR, 2; SALE; WARRANT.

WARRANT.

An objection to the form of a warrant, issued for the arrest of an accused person and his appearance before a district court, if it could ever have availed him, is waived by his omission to take it in that court, and cannot be taken, for the first time, in the Superior Court on appeal. *Commonwealth* v. *Hart*, 416.

WARRANTY.

A., by a contract in writing, pledged to B. certain tobacco, reciting that it was A.'s "own property and free from all incumbrance and all of the crop" of a certain year. B. borrowed money of C. and delivered the tobacco to him, and gave him an assignment of all his "right, title and interest in and under the contract, together with all the property therein mentioned." *Held*, that there was no implied warranty of title to the tobacco or of its quality, between B. and C. *National Bank of Northampton* v. *Mass. Loan & Trust Co.* 330.

WATERCOURSE.

In an action by A., a mill-owner, against B., another mill-owner, lower down the same stream, for maintaining his dam at too great a height, whereby the water was set back, A. offered evidence tending to show that he had the right by deed to discharge the water from his mill through a raceway running through the land of B. into the river below. B. contended that the raceway was a natural channel of the river, which divided at a point above A.'s mill, and formed an island, upon which B.'s mill was situated; that A.'s mill discharged the water into this natural stream on his own land; and that the rights of both parties were to be construed and determined accordingly. *Held*, that B. had no ground of exception to a ruling, based on his theory, that A. had the right to pass the water discharged from his premises into the river below. *Brown* v. *Dean*, 254.

WATERWORKS.

The St. of 1856, *c.* 189, authorizing the city of Worcester, for the purpose of supplying the city with pure water, to take and convey into the city the waters of one of several streams or of a certain pond, at the election of the city council, and all water-rights connected therewith, and to take and hold

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land for such purpose, but not prescribing any mode by which the city should manifest its purpose to take any estate against the owner's right, nor providing for any notice, public or otherwise, to the owner of such purpose, and providing that the act should be "void unless submitted to, and approved by, the voters of the city," was not accepted by the city until December 12, 1871. The St. of 1861, *c.* 118, authorizing the city to take and convey into the city the waters of East or Lynde Brook, "in the manner and subject to the liabilities and restrictions set forth in" the St. of 1856, *c.* 189, was approved on March 30, 1861, and took effect on its passage. On February 8, 1864, the city council voted to take the waters of East or Lynde Brook, and proceeded to introduce them into the city. The St. of 1864, *c.* 104, also authorizing the city to take and convey into the city the waters of East or Lynde Brook, was passed on March 18, 1864, and took effect on its passage. The St. of 1871, *c.* 361, passed May 26, 1871, provided that the city "shall, within sixty days from the time its city council shall vote to take any lands or ponds or streams of water, by authority of this or any former act, file in the office of the registry of deeds," "a description of the lands, ponds or streams of water so taken as certain as is required in a common conveyance of lands, and a statement of the purpose for which the same are taken, which description and statement shall be signed by the mayor of said city, and the property so taken shall vest in said city from the time of the filing of said description and statement; that a landowner injured by such taking might apply by petition to the Superior Court within a certain time "from the taking of the said land, water or water-rights as aforesaid," for the assessment of his damages; and that "nothing in this act shall be construed to authorize said city to take" what it "is not now authorized by law to take." On December 22, 1871, the city council voted to take the waters of East or Lynde Brook, and directed the mayor to duly file the description and statement required, which the mayor did on December 27, 1871. A corporation which acquired title in 1870 to property, alleged to have been injured by the introduction of water in 1864, and for which no compensation had been made, duly filed its petition for damages under the St. of 1871, *c.* 361. *Held*, that the petition could be maintained. *Crompton Carpet Co.* v. *Worcester*, 498.

See CITY, 1, 2.

WAY.

1. A petition under the Gen. Sts. *c.* 44, § 19, to the mayor and aldermen of a city, alleging the ownership of land on A. Street and damages thereto because of repairs on A. Street, B. Street and C. Street, with a prayer for compensation, is sufficient, and will entitle the petitioners to damages sustained by reason of the repairs on A. Street. *Wilbur* v. *Taunton*, 522.
2. The provisions of the Gen. Sts. *c.* 43, § 65, requiring a report of the laying out or altering of a town way to be filed in the town clerk's office seven days before a meeting of the voters to take action thereon, are not applicable to ways laid out by the authorities of a city. *Poor* v. *Blake*, 543.

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3. Where a way has been laid out or altered by the authorities of a city under an order duly passed, an entry upon any part of the land embraced in the location or alteration within two years is a sufficient entry upon all the lands included in the laying out or alteration under the St. of 1869, *c.* 303. *Poor* v. *Blake*, 543.

4. The St. of 1874, *c.* 275, § 2, providing that "every highway or town way hereafter laid out shall be deemed to be laid out" under the Gen. Sts. *c.* 43, and the amendments thereof, "unless the order laying out the same expressly declares the same to be laid out" under the betterment acts, applies to a case of widening a street by a city, the final order for which was passed after the St. of 1874 took effect. *Fuller* v. *Mayor & Aldermen of Springfield*, 289.

5. On the issue whether an alleged defect, outside of the travelled part of a highway, was within its limits, the distance between the defect and the other side of the highway being six and a half feet, the judge instructed the jury that there was no presumption that the highway was laid out wider than that because it was a county road, and refused to instruct them that they could not take into consideration the probability of a county road being laid out as narrow as the highway at that place. *Held*, that this instruction was erroneous. *Hawks* v. *Hawley*, 210.

6. In an action against a town for injuries occasioned by an alleged defect in a highway, there was evidence that the highway was twenty-six or twenty-seven feet wide between its edge on the east side and a ditch ten and a half feet wide and two and a half feet deep on the west side; that it was even, smooth and hard, and worked for travel the whole width, although the travelled part was on the west side and was from sixteen to seventeen feet in width; that there were two culverts under the road, fifty-six feet apart, the southerly one being filled up and disused; that near the northerly culvert a grassy bank sloped down gradually to the ditch, and became somewhat more abrupt a little further south, but still preserved its slope until, at the place of the accident, a point a few feet north of the southerly culvert, it suddenly retreated and became perpendicular; that there was no railing along the bank and no posts except at the northerly culvert; that the plaintiff was driving on the highway in a southerly direction with a heavily loaded wagon and two horses; that one of the horses was walking and both were under his guidance and control; that he met a wagon a few rods from the place of the accident, and turned out to the right for it, and went near the edge of the travelled road, but not outside of it; that he then saw a large wagon coming towards him in the centre of the road, and behind it a one-horse buggy, and so kept on in the same course, and did not turn back into the road again; that the wagon turned out so that there were about four feet between it and the plaintiff's wagon; that the plaintiff's wife, who was sitting at his left, said, "We 'll be off the bank;" that the plaintiff looked and saw that it was not dangerous in his opinion, and looked back at the wagon that had passed; that the plaintiff's attention was then attracted to the road, and he then saw the perpendicular

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place in the bank within three or four feet of his forward wheel; that he then found that he could not turn into the road without running into the buggy; that he could not stop or turn to the right because the wheels of his wagon were on the edge of the bank, and he would have upset sideways, that he thought the only chance to escape was to turn square off and go down the bank; that he did so, his wagon was overturned, and he injured. *Held*, that there was no evidence which would warrant the jury in finding that the plaintiff was in the exercise of ordinary care and prudence. *Little* v. *Brockton*, 511.

See EVIDENCE, 3; EXCEPTIONS, 13.

WHARF.

See DEED; EASEMENT, 2.

WIDOW.

An intestate left a widow, to whom he was married in 1855, after having unlawfully cohabited with her for eight years. They lived together after marriage for about two years, when difficulties arising between them on account of his gross and confirmed habits of intoxication, which had existed throughout their cohabitation, they agreed that she should live apart from him for a year and then return. Before she went away, he withdrew his consent, but she insisted on leaving. At the end of the year she returned, but, finding that he had a housekeeper, with whom she believed him to be living in adultery, there being no bed in the house but his own, she went away and never returned, and was not asked to do so, but continued living apart from him, rendering him no services and supporting herself, until his death, which took place some years afterwards. She had no children by him, was in her seventieth year, and had no means of support. The Probate Court, upon the application of the widow, made her an allowance of $350; and its decree was affirmed, on appeal by the administratrix, by a justice of this court. *Held*, upon appeal to the full court, that the decree should be affirmed, with costs. *Slack* v. *Slack*, 443.

See APPEAL, 2.

WILL.

1. The burden of proving that the execution of a will, offered for probate, was procured by fraud or undue influence is upon the party alleging it. *Davis* v. *Davis*, 590.
2. On the trial of the issue of fraud or undue influence in procuring the execution of a will, no exception lies to the exclusion of evidence of the testator's statements and declarations, subsequent to the execution of the will, as to its contents, not appearing to have been made so soon thereafter or so connected with evidence of his previous state of mind as to have any legitimate bearing upon the issue. *Ib.*
3. On the trial of issues of a testator's sanity and of fraud or undue influence, on an appeal from the allowance of a will by which the testator authorized

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his wife, who was executrix, if the income of the estate was insufficient, to use so much of the principal as might be necessary for her support, the presiding judge gave instructions to the jury upon both issues, which were not objected to, and, refusing to give in terms certain specific requests for instructions by the appellants, also instructed the jury that if they were satisfied that testator executed the will and that he was of sound mind, and that the will was read to him twice, and that he suggested an alteration in it which was made, it was to be presumed that he knew what it contained, and that it was not for them to inquire into the meaning attached by him to its provisions unless he was deceived as to its contents; that if the attorney who drew the will had answered falsely when inquired of as to the meaning of particular clauses, or had made different provisions from what he was instructed to make, falsely representing them as having the effect intended by the testator, it would be a fraud on the testator; and that the clause as to the use of the principal authorized the wife to use it if necessary, either at her own discretion or under direction of the court, and if the testator instructed the attorney that he wished her to have authority to so use the principal, and, on hearing the clause read, did not inquire as to whether there would be any control over her in exercising the right to use it, the silence of the attorney was not evidence of fraud, and it was immaterial whether the clause gave the wife an absolute discretion in the matter or not. *Held*, that the instructions were sufficiently favorable to the party contesting the validity of the will. *Davis* v. *Davis*, 590.

4. Oral evidence that a testatrix, who devised all her estate to her husband, was a woman of great intelligence and capacity, that she was very fond of her children, who were of tender age and never separated from her, that she had great affection for and the most perfect confidence in her husband, and that he was very devoted to her, is admissible, and will justify a finding that her omission to provide in her will for her children was intentional and not occasioned by accident or mistake, although no declaration of the intention of the testatrix appears. *Buckley* v. *Gerard*, 8.

5. An erasure by a testator of certain clauses in his will, with the intention of revoking them only, is a valid revocation of such clauses, but not of the whole will; and the property thereby covered, in the absence of a contrary intention, passes under a general residuary clause in the will. *Bigelow* v. *Gillott*, 102.

See DEVISE AND LEGACY.

WITNESS.

If, on a complaint for selling intoxicating liquor, the person to whom the liquor is alleged to have been sold, and who testifies to the sale, admits that he went to the defendant's place of business for the purpose of procuring evidence against him, and was paid for it, the defendant has no ground of exception to the refusal of the judge to give an instruction that the evidence of such person should be considered with great care, or to the giving of an instruction that in considering his testimony the jury should have regard to

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what appeared in the evidence, as to the part he had taken, that when a witness has by words or acts manifested a feeling adverse to the defendant, or, for any cause, might be affected by prejudice, the jury should consider and weigh these facts, and make reasonable allowance therefor, in considering his testimony. *Commonwealth* v. *Trainor*, 414.

See POOR DEBTOR, 3.

WORDS.

"Commodity." See *Commonwealth* v. *Lancaster Savings Bank*, 493, 495.
"Drunkenness." See *Commonwealth* v. *Coughlin*, 436.
"Ferry." See *Attorney General* v. *Boston*, 460, 468.
"High school." See *Attorney General* v. *Butler*, 304, 306.
"Laid out." See *Fuller* v. *Mayor & Aldermen of Springfield*, 289, 290.
"Privilege." See *Ripley* v. *Knight*, 515, 519.
"Shareholder." See *Revere* v. *Boston*, 375.
"Shore." See *Hathaway* v. *Wilson*, 359, 361.

WORK AND LABOR.

In an action on an account annexed for work and labor, the evidence tended to show a special contract, not in writing, by which the plaintiff agreed to do certain work for the defendant, and to receive in payment therefor a lot of land, to be selected by him out of a number of lots owned by the defendant, and blacksmith's work to a stated amount from a firm of blacksmiths; and that the plaintiff, after performing the labor, refused to accept payment as stipulated by the contract. *Held*, that, if the defendant was always ready and willing to convey to him the land at its fair market value, and the firm of blacksmiths was always ready to do the blacksmith's work for him at agreed or reasonable prices, the plaintiff could not rely on the fact that the special contract was not in writing, as required by the statute of frauds. *Held, also*, that the plaintiff could not prove, in this form of action, that, after allowing for the value of a lot and the stipulated amount to be paid in blacksmith's work, there would still be a balance due to him. *Riley* v. *Williams*, 506.

WRIT OF ENTRY.

1. A tenant in a writ of entry, who pleads the general issue of *nul disseisin*, and upon the same paper, "and, in addition to said plea, sets forth the following ground of defence," to wit, nontenure, sufficiently complies with the rule of the Superior Court requiring nontenure to be presented in a specification of defence at the time of filing the plea. *Truro* v. *Freeman*, 187.
2. Under a specification of nontenure, a tenant in a writ of entry may show that he has only a reversionary interest in the demanded premises, and that he is not in occupation of and has no right of present possession to them, but that they are in the lawful occupation of another who has a homestead right therein. *Ib.*

See MORTGAGE, 7.

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